

Anticompetitive Intent and Refusals to Deal Under Section 1 of the Sherman Act*

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A supplier's agreement not to deal with a competitor of one of its customers can constitute a contract, combination, or conspiracy under section 1 of the Sherman Anti-Trust Act.¹ It has become a virtual axiom of antitrust law that a refusal to deal pursuant to such an agreement violates section 1 when accompanied by either anticompetitive intent or effect, or both.² However, neither the text of section 1, the common law upon which it stands, nor the Supreme Court decisions construing the section support a conclusion that joint conduct of this type violates section 1 when accompanied by anticompetitive intent alone. The conclusion that it does is simply groundless. Why this is so is the subject of this article.

I. INTRODUCTION

Agreement by a single supplier not to deal with a competitor of a customer (a "two-firm refusal") is a common commercial occurrence. Every decision by a supplier to substitute one customer for another or to maintain an existing customer while declining to sell to a prospective customer potentially rests upon such an agreement. The supplier may be a manufacturer or a distributor; the customer may be a distributor, dealer, or any other person acting as an intermediary between purchasers of a product and the product's source. Except when it is in furtherance of price-fixing,³ however, such an agreement is not *per se* unlawful under section 1. Instead, the legality is governed by what has become known as the rule of reason.⁴

This Article is limited to two-firm, nonprice refusals subject to

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1. 15 U.S.C. § 1 (1976) (originally enacted as § 1 of the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890)) [hereinafter sometimes referred to as the Act]. Section 1, as amended, provides as follows: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. See text accompanying notes 13-17 *infra*.

3. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977).

4. Any argument to the contrary was foreclosed by the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.* 433 U.S. 36 (1977). There, in overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court held that "nonprice vertical restrictions" are not *per se* illegal, but are to be evaluated under the rule of reason. 433 U.S. at 51 n.18, 58-59. Both the Ninth and Second Circuits

evaluation under the rule of reason. The rule of reason focuses attention on the circumstances surrounding and resulting from joint conduct. Under the rule, the legality of a contract, combination, or conspiracy under section 1 must be evaluated "by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."⁵ The classic definition of the rule was announced in *Board of Trade v. United States (Chicago Board of Trade)*:⁶

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are

have approved applications of this holding to a single-supplier, single-customer refusal, such as that under consideration here. See *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386-88 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 130-34 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978).

In *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), the Court of Appeals for the Third Circuit suggested that a two-firm refusal that curtails intrabrand competition may be *per se* illegal under the policy against horizontal restraints developed in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and other cases. After making several observations about what it thought the law might be, the *Cernuto* court reasoned, however, that the *per se* rule was applicable to the defendant's refusal to deal because the refusal was aimed at eliminating price competition. *Id.* at 165.

Moreover, the rule of *per se* illegality would apply to a joint vertical refusal if more than one firm at either the supplier or customer level were a party to it, and the refusal was motivated by anticompetitive intent. The refusal would then constitute a classic group boycott, or refusal to deal. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1020-24 (9th Cir. 1972), *cert. denied sub nom. Western Internat'l Hotels Co. v. United States*, 409 U.S. 1125 (1973). Cf. *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) (holding that sham bidding does not constitute a *per se* violation). See also cases cited in note 234 *infra*. A two-firm refusal, however, obviously lacks any concert among parties at the same level.

Although there is a tenuous thread of cases, originating with *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 522 (1932), that recognizes the proposition that joint conduct carried out with an intent to eliminate a competitor is subject to the *per se* rule, see, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560-62 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, 353 F.2d 618, 622 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966); cf. *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc.*, 443 F. Supp. 639, 642-44 (N.D. Fla. 1977), *aff'd*, 594 F.2d 114 (5th Cir. 1979) (*per curiam*); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 414 F. Supp. 1088, 1092-94 (N.D. Tex. 1976), the limited and declining judicial acceptance of the *Pick-Barth* doctrine, see, e.g., *Northwest Power Products, Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 86-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Stifel, Nicholas & Co. v. Dain, Kalman & Quail, Inc.*, 578 F.2d 1256, 1259-61 (8th Cir. 1978), together with its virtual repudiation in the circuit of its origin, see *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560-62 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), make this line of cases at best an aberration. These cases will, accordingly, not be discussed in the following pages.

5. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Under the *per se* rule, on the other hand, certain types of joint conduct are "conclusively presumed illegal without further examination" of the surrounding circumstances. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 99 S. Ct. 1551 (1979).

6. 246 U.S. 231 (1918).

all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁷

Application of rule-of-reason analysis to a two-firm refusal has almost uniformly led to the conclusion that the refusal is, subject to the exceptions noted below, lawful under section 1. The refusal is not proscribed, because it produces no restraint of trade or commerce, as *H & B Equipment Co. v. International Harvester Co.*,⁸ a typical distributor termination case, illustrates. In that case, a former distributor of bulldozer-loaders, backhoes, and hydraulic excavators manufactured by International Harvester Company (IH) alleged that IH had conspired with IH's local branch office to drive the distributor, H & B, out of business. The complaint alleged that IH had, among other things, forced H & B to terminate its distributorship arrangement with IH.⁹

At the close of H & B's case, the district court directed a verdict for IH. The Court of Appeals for the Fifth Circuit affirmed, concluding that H & B had failed to prove the existence of a conspiracy,¹⁰ and that no section 1 claim had been stated. On the merits of the section 1 claim, the court held that H & B had totally failed to establish that the distributorship termination was productive of anticompetitive effects. The termination had no impact on interbrand competition because it resulted only in the substitution of an IH branch office (which was later sold to an independent third party) for H & B.¹¹ Furthermore, the termination had no measurable impact on intrabrand competition since four other IH distributors continued in business in the area even after the termination.¹²

Two-firm refusals have, however, been held to violate section 1 under certain circumstances. Those circumstances were recently summarized by the Court of Appeals for the Fifth Circuit:

[A] manufacturer generally may determine the method of distribution. A manufacturer may terminate even a successful distributor and select another distributor even if the arrangement was solicited by the second distributor. *The selection of one distributor or method of distribution violates §1 only if the purpose or effect is anticompetitive.* Thus the action is illegal only if taken expressly to drive the plaintiff out of business; or in an attempt to

7. *Id.* at 238.

8. 577 F.2d 239 (5th Cir. 1978).

9. *Id.* at 242.

10. *Id.* at 243-45.

11. *Id.* at 246.

12. *Id.* Cases holding that substitution of distributors or dealers causes no anticompetitive effect and is therefore outside the reach of § 1 are legion. Representative decisions include *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248-49 (5th Cir. 1975); *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094-95 (3d Cir. 1972); *Ace Beer Distrib., Inc. v. Kohn, Inc.*, 318 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420-21 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 904-07 (D. Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

monopolize; or to fix prices; or to force the plaintiff to accept resale price restrictions or territorial allocations; or to increase the manufacturer's market dominance; or if the manufacturer engages in predatory practices.¹³

Refusals that produce unreasonable restraints on intrabrand competition without countervailing benefits to interbrand competition must be added to this list.¹⁴

The focus of this Article is the conduct described by the italicized language in the preceding quote: a two-firm, nonprice refusal in which "the purpose . . . is anticompetitive." It would be helpful, of course, to know what the courts mean by "anticompetitive" purpose or intent, but they have failed to define the phrase as it has been applied in rule-of-reason cases.¹⁵ The absence of a definition has not, however, deterred the courts from predicated decisions on a finding of such a purpose. For example, it has recently been held that a contract, combination, or conspiracy, not productive of any discernible restraint of trade, nonetheless violates section 1 if accompanied by an intent to restrain trade.¹⁶ Moreover, there are several cases in which it has been held, without attention to effect, that the reasonableness, or lack of reasonableness, of a contract, combination, or conspiracy turns on the presence or absence of anticompetitive intent.¹⁷

The judiciary's failure to give content to "anticompetitive purpose"—also variously referred to as "intent," "object," or "motive"¹⁸—constitutes a tacit admission that a competitor's state of mind is, at best, a poor criterion for the measurement of section 1 legality. This admission is well-

13. *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 961 n. 3 (5th Cir. 1978), *vacated on other grounds by stipulation of the parties*, 591 F.2d 1206 (5th Cir. 1979) (emphasis added) (citations omitted).

14. *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-56 (1977). For cases in which the presence of additional distributors was relied upon to support a conclusion that a manufacturer's termination of a single distributor caused no significant adverse effect on intrabrand competition, see *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 119 (E.D.N.Y. 1976).

15. Efforts have been made to look behind this phrase in decisions addressing the applicability of the *per se* rule to group boycotts. It has been observed, for example, that a forbidden purpose is one that aims at "exclusionary or coercive" conduct. *E.g.*, *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Sum of Squares, Inc. v. Market Research Corp.*, 401 F. Supp. 53, 56-57 (S.D.N.Y. 1975).

16. *See Magnus Petroleum Co. v. Skelly Oil Co.*, 446 F.Supp. 874, 880 (E.D. Wis. 1978), *rev'd*, 599 F.2d 196 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3253 (Oct. 16, 1979). *See also* discussion at notes 270-73 and accompanying text *infra*.

17. *See, e.g.*, *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978); *Alpha Distrib. Co. v. Jack Daniel Distillery*, 454 F.2d 442, 452 (9th Cir. 1972); *Robinson v. Magovern*, 456 F. Supp. 1000, 1005-06 (W.D. Pa. 1978). For a discussion of *Fount-Wip*, see text accompanying notes 239-51 *infra*.

18. "Intent," "purpose," "motive," and "object" differ subtly from each other in meaning. The distinction between "intent" and "motive," for example, may have significance both in tort law, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 767, Comment d (1979), and criminal law, *see, e.g.*, Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 658-62 (1917). In applying these terms to § 1, however, the courts have shown no concern about any differences in meaning; they have used the terms interchangeably when referring to the defendant's state of mind. For convenience, an "evil" state of mind will be referred to in this Article simply as "anticompetitive intent."

founded, for there is simply no ground for making a party's state of mind dispositive of legality under section 1. Instead, as Justice Brandeis observed in the passage from *Chicago Board of Trade* quoted above, state of mind is significant only to the extent that evidence of it assists in evaluating the competitive effect of a restraint.¹⁹

The limited importance of anticompetitive intent in the context of a two-firm refusal will be established in the following pages of this Article. The Article will first review the text of section 1 and its legislative history. It will then turn to a review of the common law doctrines upon which section 1 is based and which it has incorporated. The judicial origins of the fallacy that anticompetitive intent alone can support a holding of section 1 illegality will then be reviewed.²⁰ Finally, the Article will discuss the cases in which that fallacy has been rejected.

II. THE TEXT AND BACKGROUND OF SECTION 1

On July 2, 1890, President Benjamin Harrison signed what has become known as the Sherman Act into law. Section 1 of that Act provides in part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."²¹ This language (which has never been amended) does not, by its terms, make a contract, combination, or conspiracy unlawful if accompanied by anticompetitive intent alone.

Before undertaking a review of the legislative history, it should be noted that section 1 has both criminal and civil dimensions. The second sentence of section 1 provides that participation in a restraint of trade is a misdemeanor.²² Section 7 of the Sherman Act,²³ which was incorporated into section 4 of the Clayton Act²⁴ in 1914, provided for the recovery of treble damages by any person injured in his business or property by reason of any conduct declared illegal by the Sherman Act and, after passage of the Clayton Act, by the antitrust laws in general.²⁵ Participation in conduct

19. See text accompanying note 6 *supra*.

20. Although this Article confines attention to vertical two-firm refusals, its conclusion that anticompetitive intent alone is not a ground for § 1 liability has application to any case, such as, e.g., *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1151 (5th Cir. 1977), subject to rule-of-reason scrutiny.

21. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)). See note 1 *supra* for the full text of section 1 as amended.

22. 15 U.S.C. § 1 (1976). Section 1 was amended effective December 21, 1974, to make its violation a felony. See Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974).

23. 26 Stat. at 210. For the text of § 7, see note 51 *infra*.

24. 15 U.S.C. § 15 (1976) (original version at ch. 323, § 4, 38 Stat. 731 (1914)).

25. *Id.* Section 4 provides in pertinent part as follows:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

proscribed by section 1 could thus expose a party to both criminal and civil liability.

The Supreme Court recently affirmed, in *United States v. United States Gypsum Co.*,²⁶ the proposition that criminal intent must be proved by the government in a prosecution under section 1. Faced with what it viewed as the "minimal assistance" offered by the text of the Act and an "unhelpful" legislative history,²⁷ the Court surveyed "more general sources and traditional understandings of the nature of the element of intent in the criminal law."²⁸ Based upon its review of these sources, the Court concluded that "action undertaken with knowledge of its probable consequences, and having the requisite anticompetitive effects can be a sufficient predicate for a finding of liability under the antitrust laws."²⁹ To obtain a conviction, the government must therefore prove both anticompetitive effect and an intent to produce the effect.

In the same opinion, the Court observed that it was leaving unchanged "the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect."³⁰ We now turn to a consideration of whether this "general rule" in fact finds any support in the legislative history of section 1 or the common law upon which it stands.

A. *Legislative Background of Section 1*

Congress declared contracts, combinations, and conspiracies in restraint of trade or commerce unlawful in section 1. Focusing solely on this language, early Supreme Court decisions construing the section held that all restraints of interstate trade and commerce had been proscribed.³¹ The Court arrived at this position, in part, by refusing to acknowledge the debates and other congressional activity leading to passage of the Act.³²

26. 438 U.S. 422 (1978).

27. *Id.* at 443, 444.

28. *Id.* at 444.

29. *Id.* For an earlier formulation of the intent needed for conviction under § 1, see *United States v. Patten*, 226 U.S. 525, 543 (1913): "[B]y purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, [defendants] are, in legal contemplation, chargeable with intending that result." The standard of intent approved in *United States Gypsum* also applies in civil actions alleging monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2 (1976). See, e.g., *United States v. Griffith*, 334 U.S. 100, 105 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (*per curiam*) ("Defendant having willed the means, has willed the end").

30. 438 U.S. at 436 n.13. See note 270 *infra* regarding the Court's citation of authority for this "general rule."

31. See *Loewe v. Lawlor*, 208 U.S. 274, 297 (1908); *Northern Sec. Co. v. United States*, 193 U.S. 197, 331 (1904); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 559-62, 573-78 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312, 327-29 (1897). For a representative lower court decision following this view of § 1, see *Chesapeake & Ohio Fuel Co. v. United States*, 115 F. 610, 619, 622 (6th Cir. 1902).

32. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897) (debates are not a proper source for determining meaning of language in the Act).

Although resort to the debates was initially eschewed, it was expressly approved by the Court in *Standard Oil Co. v. United States*³³ and later in *Apex Hosiery Co. v. Leader*.³⁴ A short outline of the legislative history of the Act is a necessary predicate to review of the relevant debates.³⁵

1. *Passage of the Act*

At the outset of the first session of the 51st Congress, Senator Sherman introduced the legislation which, in altered form, would become the Sherman Anti-Trust Act. His bill, designated S. 1,³⁶ was substantially the same as another bill, S. 3445, that he had introduced in the first session of the 50th Congress some two years earlier.³⁷ That bill had been debated on the floor of the Senate in January and February of 1889 but no further action was taken on it.³⁸

The Finance Committee, to which S. 1 had been committed, reported out an amended version of the new bill on January 14, 1890.³⁹ After

33. 221 U.S. 1 (1911).

34. 310 U.S. 469, 489, 493 n.15 (1940).

35. For details of the legislative history of the Act, see generally 1 E. KINTNER, *LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 13-30* (1978) [hereinafter cited as KINTNER]; H. THORELLI, *FEDERAL ANTITRUST POLICY 164-232* (1955) [hereinafter cited as THORELLI]; and Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

36. The text of S. 1, as introduced, is as follows:

That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

SEC. 2. That any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or combination may sue for and recover in any court of the United States or competent jurisdiction, of any person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination.

SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section 1 of this act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States shall be subject to a fine of not more than \$10,000 or to imprisonment in the penitentiary for a term of not more than five years, or to both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which such persons reside to institute the proper proceedings to enforce the provisions of this act.

The text is reprinted at 21 CONG. REC. 2599 (1890) and in KINTNER, *supra* note 35, at 89-90 (punctuation differs between these two reprints; the above quotation follows the CONGRESSIONAL RECORD).

37. For the text of S. 3445, as introduced by Senator Sherman, see KINTNER, *supra* note 35, at 63-64. The text of S. 1 (which is reproduced in note 36 *supra*) as introduced by Senator Sherman in the 51st Congress on December 4, 1889, is identical to the text of S. 3445 after it had been amended by the Finance Committee and reported to the Senate on September 11, 1888. See KINTNER, *supra* note 35, at 64-65.

38. See THORELLI, *supra* note 35, at 171-73.

39. See THORELLI, *supra* note 35, at 177. The committee had added, among other things, a

preliminary floor debate on February 27, 1890, the bill was sent back to the committee. The Finance Committee reported out an amended version of the bill on March 18, 1890, revised in response to certain objections that had been raised in the debate of February 27.⁴⁰ Floor debate on this version of the bill began on March 21, 1890, and continued on March 24 through March 27.

provision in § 2 for the doubling of damages. As reported out by the Finance Committee, the bill provided as follows:

That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with the intention to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or intended for and which shall be transported from one State or Territory to another for sale, and all such arrangements, contracts, agreements, trusts, or combinations between persons or corporations intended to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful, and void.

SEC. 2. That any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or combination may sue for and recover, in any court of the United States of competent jurisdiction, of any person or corporation a party to a combination described in the first section of this act, twice the amount of the damages sustained, and the costs of suit.

SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section one of this act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States shall be subject to a fine of not more than \$10,000 or to imprisonment in the penitentiary for a term of not more than five years, or to both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which such persons reside to institute the proper proceedings to enforce the provisions of this act.

The text is reprinted at 21 CONG. REC. 2599 (1890), and in KINTNER, *supra* note 35, at 93-94. The italicized word "or" in § 1 appears in KINTNER but not the CONGRESSIONAL RECORD (punctuation also differs between these two reprints; the above text follows the punctuation in the CONGRESSIONAL RECORD).

40. See THORELLI, *supra* note 35, at 179. As amended, S. 1 provided as follows:

That all arrangements, contracts, agreements, trusts, or combinations between two or more citizens or corporations, or both, of different States, or between two or more citizens or corporations, or both, of the United States and foreign states, or citizens or corporations thereof, made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production, or manufacture of any State or Territory of the United States with similar articles of the growth, production, or manufacture of any other State or Territory, or in the transportation or sale of like articles, the production of any State or Territory of the United States into or within any other State or Territory of the United States; and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void. And the circuit courts of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provisions. And the Attorney General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution.

SEC.2. That any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee.

21 CONG. REC. 2455 (1890).

Numerous amendments, none of them relevant to the present inquiry, were made by the Committee of the Whole on March 25 through March 27.⁴¹ Over strenuous objection,⁴² the bill was referred to the Judiciary Committee on March 27 for consideration of what were thought by many senators to be serious questions about the power of Congress under the Commerce Clause to enact the legislation.⁴³ The Judiciary Committee reported out an amended version of S. 1 on April 2, 1890,⁴⁴ with a proposal

41. See THORELLI, *supra* note 35, at 191-98.

42. The view of Senator Vance of North Carolina was shared by many of those senators opposing reference to the Judiciary Committee:

Mr. President, I never have a bill in which I feel any interest referred to this grand mausoleum of Senatorial literature, the Judiciary Committee, without feeling that I have attended a funeral. This occasion is no exception to that feeling. The grand air of magisterial dominion which surrounds those gentlemen who constitute that committee, the awful profundity and gravity with which they are enveloped, naturally tend to produce a funereal impression upon a serious mind, and the whole atmosphere seems to me resonant with the strains of that familiar old hymn:

Hark! from the tombs a doleful sound;
Mine ears attend the cry.
Come, living men, and view the ground
Where your bills must shortly lie.

[Laughter.]

I recollect very well when a bill was passed through this body forbidding the employment of any Senator or Representative as counsel for any railroad which had been subsidized by the Government. We all thought it was a mighty good bill and a mighty proper one, and so thought the Senate; but a motion to reconsider was made. The question was discussed, and it was finally proposed to refer it to the Judiciary Committee. On that occasion I bade my friend farewell. I was promised, however, that it should come back. It did come back, but, alas, it did not come back in the same body in which it went. It was Greece, but living Greece no more. It came back mangled and mutilated until its parent knew it not and disclaimed its paternity. [Laughter.]

Mr. President, I think if it were not so late in the evening and the Senate would give me its patient attention that I could demonstrate the fact that if a man desired to go to any given point he must start, and that he never would get there until after he did start, and my opinion is that we never shall get a bill for the suppression of the trusts and combinations which oppress a large portion of the American people so long as we consign all of our bantlings to the fostering care of the Judiciary Committee. I say it with all due respect to that great committee, of course. I am a man too cautious of my personal safety to desire to do anything that would bring upon me the enmity or the disregard of that august body. [Laughter.]

So, if it is the determination of the Senate to send this bill to the Judiciary Committee, to deliver the child for nurture to the persons having most interest in its death, I shall have sorrowfully to submit myself to that state of things, but I hope I may be pardoned for saying that I feel a good deal as we are given to understand the Apostle Paul felt when he took leave of the elders at Ephesus. Having told them that he should depart from them never more to return; the record says:

They all wept sore and fell on Paul's neck, sorrowing most of all for the words which he spake, that they should see his face no more.

I am satisfied, sir, that when this bill does come back it will be so mutilated, that it will have everything that can possibly be of any benefit to the people of this country so entirely eliminated and eradicated, that it will for practical purposes not be worth the paper that it is written upon, and the country will so accept it. The country knows the receptacles where we deposit our dead by this time. We can no longer hope to conceal them.

21 CONG. REC. 2610 (1890).

43. See, e.g., *id.* at 2607 (remarks of Senator Platt).

44. *Id.* at 2901. As reported from the committee, the bill provided in pertinent part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such

to amend S. 1 by substituting its version of the bill for everything after the enacting clause. The Senate passed the committee's version of the bill, without amendment, on April 8, 1890.⁴⁵

The House took up consideration of S. 1 on May 1, 1890, and passed an amended version of the bill on the same date.⁴⁶ Senate consideration of the House version followed, and the bill was in turn submitted to a conference committee. The conference committee's report was rejected by the House on June 12, 1890.⁴⁷ A second conference committee issued its report on June 18, 1890, recommending that both houses retract their amendments and enact S. 1 as originally passed by the Senate.⁴⁸ The Senate approved the report on the same day,⁴⁹ and the House followed on June 20, 1890.⁵⁰ The bill was signed into law on July 2, 1890.⁵¹

combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Id. at 3145.

45. *Id.* at 3153.

46. *Id.* at 4104. See THORELLI, *supra* note 35, at 202-06 for a description of the House debate. The text of the debate appears at 21 CONG. REC. 4088-101 (1890).

47. 21 CONG. REC. 5981-83 (1890). For an account of Senate consideration of the House version of S. 1, the deliberations of the first conference committee, and the votes on its report, see THORELLI, *supra* note 35, at 206-09.

48. The conference committee's report is reprinted at 21 CONG. REC. 6208 (1890).

49. *Id.*

50. *Id.* at 6312-14.

51. The final version of the Act read as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of

2. *The Debates*

The debates offer limited, but crucial, guidance on the role of intent in determining civil liability for "restraint of trade." As will be seen, the debates lead our attention to the common law doctrines applicable to joint conduct affecting trade and commerce and establish that section 1 was to draw its content from those doctrines.

As introduced by Senator Sherman, the first section of S. 1 contained no direct reference to restraint of trade. Instead, it proscribed "all arrangements, contracts, agreements, trusts, or combinations . . . made with a view or which tend to prevent full and free competition . . . and all arrangements, contracts, agreements, trusts, or combinations . . . designed or which tend to advance the cost [of articles] to the consumer. . . ."⁵² Even with this wording, however, the bill, according to the senator, did "not announce a new principle of law, but applie[d] old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar

Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sherman Anti-Trust Act, ch. 647, 26 Stat. 209-10 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

52. See note 36 *supra* for the full text of the original version of S. 1.

contracts in any State in the Union [were], by common or statute law, null and void."⁵³

The role of a defendant's intent in civil proceedings under Senator Sherman's version of the bill was addressed by the senator himself. In discussing the provisions that would give federal courts jurisdiction to grant injunctive relief at the instance of the Attorney General and creating a private right of action for persons injured, the senator noted that:

[T]he intention of the combination is immaterial. The intention of a corporation cannot be proven. If the natural effects of its acts are injurious, if they tend to produce evil results, if their policy is denounced by the law as against the common good, it may be restrained, be punished with a penalty or with damages, and in a proper case it may be deprived of its corporate powers and franchises. It is the tendency of a corporation, and not its intention, that the courts can deal with.⁵⁴

Sherman found it necessary to address the question of intent because the Finance Committee had initially amended S. 1 to condition liability on the intent of the parties to a combination.⁵⁵ Sherman urged that intent was relevant only to section 3 of the bill, which provided criminal penalties for the acts of individuals in furtherance of a combination declared unlawful under section 1. Moreover, he proposed that the criminal feature of the bill should be omitted:

Every corporation engaged in business must be responsible for the tendency of its business, whether lawful or unlawful, but individuals can only be punished for criminal intentions. To require the intentions of a corporation to be proven is to impose an impossible condition and would defeat the object of the law. To restrain and prevent the illegal tendency of a corporation is the

53. 21 CONG. REC. 2456 (1890). Senator Sherman repeatedly urged that the bill was designed only to give the federal courts jurisdiction over conduct already proscribed at common law: It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination.

[A]ll I wish is to have the courts of the United States do by these greater combinations what has been done already by the courts of the States.

Now, Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies.

As I said in my argument—and I do not want to repeat it over again—this bill is simply an attempt to extend the jurisdiction of the courts of the United States, to declare unlawful contracts which have been held unlawful in every state of the Union where the subject has been brought before the courts; nothing more, nothing less.

Id. at 2457, 2458, 2461, 2563.

This view of this form of the bill was shared by Senator Hoar of Massachusetts, a senior member of the Judiciary Committee and co-author with Senators Edmunds of Vermont and George of Mississippi of the final version of the bill: "[Nothing is] prohibited in this bill which is not prohibited by the general common law, as [Senator Platt of Connecticut] and I learned it in our studies, in regard to such things as are covered by the English common law." *Id.* at 2729.

54. *Id.* at 2456.

55. The Committee's original amendments to S. 1, reported on January 18, 1890, added an intent requirement. See note 39 *supra*. Sherman insisted in debate with Senator George that this amendment had, in fact, not been adopted by the Committee. See 21 CONG. REC. 2461 (1890) (remarks of Sen. Sherman).

proper duty of a court of equity. To punish the criminal intention of an officer is a much more difficult process and might well be left to the future.⁵⁶

Sherman believed the lack of any need to prove intent to be central to the success of the civil remedies in the bill, since Senator George, the leading opponent of Sherman's bill, had earlier insisted that the remedies were unworkable because dependent upon proof of specific intent to violate the law.⁵⁷ Sherman defended his version of the bill, as reported out by the Finance Committee, as containing no such requirement. Under his version, effect was crucial; intent was not. As he phrased it: "The tendency is the test of legality. The intention is the test of a crime."⁵⁸

The Judiciary Committee's amendment of S. 1 abandoned any reliance on either "tendency" or "intention." Without departing from Senator Sherman's insistence that the bill was designed to give the federal courts jurisdiction over conduct already proscribed at common law, the committee dramatically simplified the text of section 1 to provide only that contracts, combinations, or conspiracies "in restraint of trade or commerce" would be illegal. The members of the committee offered no specific explanation during debates for departure from Sherman's formulation of section 1, but Senator Hoar characterized the committee's general objective as follows: "We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty."⁵⁹

Senator Edmunds of Vermont, chairman of the Judiciary Committee and author of substantially all of the amended version of section 1,⁶⁰ concurred in Senator Hoar's view:

[T]he committee . . . thought that . . . we would frame a bill that should be clearly within our constitutional power, that we should make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise.⁶¹

Senator Edmunds explained that his amendments to S. 1 were aimed primarily at reducing Sherman's version of the bill, with the amendments it had accumulated by the time it was referred to the Judiciary Committee, to intelligible simplicity: "I should hope that the Senate of the United States . . . would allow us to pass a bill that is clear in its terms, is definite in its definitions, and is broad in its comprehension, without winding it up into infinite details"⁶²

56. 21 CONG. REC. 2457 (1890).

57. Senator George's remarks appear at 21 CONG. REC. 1765-67 (1890).

58. *Id.* at 2461.

59. *Id.* at 3146.

60. See Letwin, *supra* note 35, at 254.

61. 21 CONG. REC. 3148 (1890).

62. *Id.*

Senator Hoar confirmed, in discussing the meaning of "monopolize" in section 2 of the amended bill, that the terms of S. 1, as amended, were to draw their content from the common law:

"[M]onopoly" is a technical term known to the common law[;] . . . the word "monopoly" is a merely technical term which has a clear and legal signification

. . . . The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction [W]e find the United States without any common law. The great thing that this bill does . . . is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.⁶³

With this legislative background in mind, we now turn to a review of the common law of restraints of trade as it existed at the time the Act was adopted.

B. *The Common Law and the Content of Section 1*

Section 1 of S. 1, standing, as the chairman of the Judiciary Committee had observed, on terms "well known to the law already,"⁶⁴ was enacted as section 1 of the Sherman Act. Although section 1 applies to an infinite variety of factual situations, the legal content of the section is well-defined. Its meaning is sharply delimited by the common law meanings of "contract, combination, or conspiracy" in "restraint of trade" at the time of the passage of the Act.

The Supreme Court acknowledged the applicability of the common law definitions to section 1 in *Standard Oil Co. v. United States*.⁶⁵ Writing for the majority, Justice White, who in previous decisions had vigorously dissented from the Court's literal reading of the section,⁶⁶ concluded that "restraint of trade" must be given its common law meaning⁶⁷ and taken to signify only "undue" restraints.⁶⁸ He summarized this holding later in the same term in *United States v. American Tobacco Co.*,⁶⁹ a case decided only two weeks after the *Standard Oil* decision:

Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting

63. *Id.* at 3152.

64. *Id.* at 3148 (remarks of Sen. Edmunds).

65. 221 U.S. 1 (1911).

66. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 344-46 (1897) (White, J., dissenting).

67. 221 U.S. at 50-59.

68. *Id.* at 59-60.

69. 221 U.S. 106 (1911).

competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.⁷⁰

This principle of statutory construction was most effectively summarized by the Second Circuit Court of Appeals in *Charles D. Briddell, Inc. v. Alglobe Trading Corp.*,⁷¹ a 1952 decision that construed a provision of the Lanham Act.⁷² “[W]hen the legislature borrows such words [words with an established common law meaning], they are deemed to retain their previous meaning unless there is a contrary legislative intention clearly expressed in the statute or its history.”⁷³ Justice White approved application of the principle to section 1 of the Sherman Act in the *Standard Oil* case:

Let us consider the language of the first and second sections [of the Act], guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.⁷⁴

Thus, to determine whether there is a violation of section 1 when joint conduct is accompanied solely by anticompetitive intent, one must inquire into the state of the common law at the time the Sherman Act was adopted. If that conduct was void, actionable, or unlawful under the common law, it is necessarily unlawful under section 1. If, on the other hand, the joint conduct was not void, actionable, or unlawful at common law, it is not unlawful under section 1.

Two separate and distinct common-law doctrines underlie the operative language of section 1: (1) contracts in restraint of trade and (2) conspiracies in restraint of trade. In reformulating section 1 to include “terms that were well known to the law already,”⁷⁵ the Judiciary Committee trimmed and altered the “arrangements, contracts, agreements, trusts, or combinations”⁷⁶ language of Senator Sherman’s version of section 1, leaving only contracts, combinations, and con-

70. *Id.* at 179.

71. 194 F.2d 416 (2d Cir. 1952) (construing in dicta a provision of the Lanham Act, 15 U.S.C. §§ 1052-1127 (1976)). *Accord*, *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 353 (1897) (White, J., dissenting); *Keck v. United States*, 172 U.S. 434, 446 (1889); *Fieldcrest Dairies, Inc. v. City of Chicago*, 122 F.2d 132, 135-36 (7th Cir. 1941), *rev’d on other grounds*, 316 U.S. 168 (1942).

72. The Lanham Act, enacted in 1946, ch. 540, 60 Stat. 427, provided procedures to register and protect trademarks.

73. 194 F.2d at 421.

74. 221 U.S. 1, 59 (1911) (footnote omitted). *See also* *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition”); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 494-500 (1940); *United States v. Trans-Missouri Freight Ass’n*, 58 F. 58, 67 (8th Cir. 1893), *rev’d on other grounds*, 166 U.S. 290 (1897).

75. 21 CONG. REC. 3148 (1890) (remarks of Sen. Edmunds).

76. *See* note 36 *supra* for the text of S. 1 as introduced by Senator Sherman on December 4 1889.

spiracies. Contracts and conspiracies in restraint of trade were common-law concepts with specific meanings; combinations were a species of the former, new to the law, but equally well understood.

1. *Contracts in Restraint of Trade*

The meaning of "contracts in restraint of trade" was fully discussed by the New York Court of Appeals in *Diamond Match Co. v. Roeber*,⁷⁷ a case decided on the eve of passage of the Sherman Act and one that is representative of common law decisions on the topic of contracts in restraint of trade. In that case, defendant Roeber was sued by the Diamond Match Company (Diamond) to enforce a covenant in which Roeber had agreed (in connection with the sale in 1880 of the assets and stock of his New York City friction match manufacturing firm to Swift & Courtney & Beecher Company (Swift)) not to engage directly or indirectly in the manufacture or sale of friction matches anywhere in the United States (except Nevada and Montana) for a period of ninety-nine years.⁷⁸ Contemporaneously with the execution of the covenant, Roeber had executed a \$15,000 bond in favor of Swift as liquidated damages in the event of his breach of the covenant.⁷⁹

Diamond, the assignee of Swift's rights under the purchase agreement,⁸⁰ employed Roeber in 1881 and 1882.⁸¹ Roeber then left Diamond and went to work for a competing firm headquartered in New Jersey.⁸² Diamond sued to enforce the covenant, and Roeber defended on the ground that it was void and unenforceable because it constituted a restraint of trade.⁸³

The court began by reviewing the English origins of the doctrine that contracts in general (as opposed to partial) restraint of trade are void. The court then noted that the doctrine was no longer followed, but that instead, the governing test of the enforceability of contracts in restraint of trade was one of reasonableness:

The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (*Rousillon v. Rousillon*, 14 L. R., Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves* (7 Bing. 735), Chief Justice TINDAL considered a true test to be "whether the restraint is such only as to afford a fair protection to the

77. 106 N.Y. 473, 13 N.E. 419 (1887).

78. *Id.* at 477-78, 13 N.E. at 419.

79. *Id.* at 479, 13 N.E. at 420.

80. Diamond had purchased the assets of Swift in 1881. *Id.* at 478, 13 N.E. at 420. For an account of the fortunes of the Diamond Match Company and its efforts to monopolize the friction match business, see *Richardson v. Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889).

81. 106 N.Y. at 479, 13 N.E. at 420.

82. *Id.*

83. *Id.* at 479-80, 13 N.E. at 420.

interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint.⁸⁴

The court concluded that the covenant in question created only a partial restraint of trade and was reasonable:

The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. (*Ward v. Byrne*, 5 M. & W. 548; *Mumford v. Gething*, 7 C. B. [N.S.] 305, 317.) It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general, restraint. . . . The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.⁸⁵

Was intent to be taken into account in determining whether a contract was void and unenforceable because in unreasonable restraint of trade? The only decision of which this author is aware that directly addresses the question is *Diamond Match Co.* The opinion in that case, however, does not detail the circumstances under which defendant raised the contention that Diamond had sought to enforce the covenant in furtherance of an intent to restrain competition. It may nevertheless safely be assumed that defendant had urged that Diamond was attempting to monopolize the friction match business and, in furtherance of this design, had sought to eliminate defendant as a competitor.⁸⁶ The court rejected the effort to prove intent or motive:

We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties.⁸⁷

84. *Id.* at 481-82, 13 N.E. at 421.

85. *Id.* at 484-86, 13 N.E. at 423. For other decisions recognizing the tests of enforceability approved in *Diamond Match Co.*, see, e.g., *Gibbs v. Consol. Gas Co.*, 130 U.S. 396, 409 (1889); *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 P. 391 (1888); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 671-73 (1880); *Hilton v. Eckersley*, 6 E. & B. 47 (Q.B. 1855), *aff'd*, 6 E. & B. 66 (Ex. 1856). On the status of the doctrine of contracts in restraint of trade on the eve of passage of the Sherman Act, see generally *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *United States v. Trans-Missouri Freight Ass'n*, 58 F. 58, 68-73 (8th Cir. 1893), *rev'd on other grounds*, 166 U.S. 290 (1897).

86. See note 80 *supra*.

87. 106 N.Y. at 483, 13 N.E. at 422.

Thus, intent and motive were not determinative of whether a contract was void as an unreasonable restraint of trade. Reasonableness was measured by the restraint that resulted from a contract without reference to the state of mind of the parties. Anticompetitive intent alone was not sufficient to void a contract.

Typically, judicial consideration of *contracts* in restraint of trade arose in connection with restraints ancillary to an employment agreement or to an agreement for the sale of a business.⁸⁸ By comparison, consideration of *combinations* in restraint of trade, a variety of these contracts, often arose in connection with agreements among competitors aimed at raising prices, dividing territories, or otherwise eliminating competition. The state courts had had many opportunities to evaluate the legality of these combinations by the time the Sherman Act was adopted.

People v. North River Sugar Refining Co.,⁸⁹ an intermediate New York appellate court decision, characterized as a "leading case" by Senator Sherman during debate on his version of S. 1,⁹⁰ is representative of these decisions. In that case, the State of New York brought an action for the dissolution of the North River Sugar Refining Company (North River), a firm engaged in the operation of sugar refineries in New York. The state argued that the corporation had ceased to exercise its statutorily ordained functions when it became a party to an agreement with other refinery companies⁹¹ under which each refinery surrendered its management authority and agreed to forward all earnings to an umbrella association, the Sugar Refineries Company (Company).⁹² North River and other firms executed the contract on August 16, 1887.⁹³ By the time of trial in 1888, a total of seventeen firms had joined the Company, "leaving in the United States certainly no more than six other companies or firms engaged in this business."⁹⁴ At the close of the evidence the trial court directed a verdict for the state on the ground that "an unlawful combination had been entered into by the defendant and these other companies to control the production and sale of sugar in the country."⁹⁵

In affirming the judgment of dissolution, the General Term of the Supreme Court held that North River had improperly abandoned management decisions to the Company⁹⁶ and entered into an agreement

88. See, e.g., the cases cited in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), and in *United States v. Trans-Missouri Freight Ass'n*, 58 F. 58, 68-73 (8th Cir. 1893), *rev'd on other grounds*, 166 U.S. 290 (1897).

89. 61 N.Y. Sup. Ct. 354, 7 N.Y.S. 406 (1889).

90. 21 CONG. REC. 2459 (1890).

91. 61 N.Y. Sup. Ct. at 372-74, 7 N.Y.S. at 410.

92. *Id.* at 358-62, 372-73, 7 N.Y.S. at 407-08, 410.

93. *Id.* at 362, 7 N.Y.S. at 408.

94. *Id.* at 363, 7 N.Y.S. at 408.

95. *Id.* at 375, 7 N.Y.S. at 410.

96. *Id.* at 372-73, 7 N.Y.S. at 410.

that was directed at an unlawful objective.⁹⁷ The court described the object of the agreement and its legality in the following terms:

A jury, certainly, would be fully justified in concluding, from the agreement and the other facts in evidence in the case, that the governing object of the association was to promote its interests and advance the prosperity of the associates, by limiting the supply, when that could properly be done, and advancing the prices of the products produced by the companies. To conclude otherwise would be to violate all the observations and experiences of practical life. This is a controlling feature in this controversy. And that it was intended to be secured by the organization provided for, and which actually took place, is reasonably free from doubt. And where that appears to be the fact, the agreement, association, combination or arrangement, or whatever else it may be called, having for its objects the removal of competition and the advancement of prices of necessities of life, is subject to the condemnation of the law, by which it is denounced as a criminal enterprise.⁹⁸

The court concluded that a combination of the type entered into by North River was criminal, basing its decision on a New York statute that made a conspiracy of two or more persons "to commit any act injurious . . . to trade or commerce" a misdemeanor.⁹⁹

The court also observed that decisions of the courts of other states supported a conclusion that the combination was void under the common law.¹⁰⁰ Typical of the decisions cited was *India Bagging Ass'n v. B. Kock & Co.*,¹⁰¹ a Louisiana case that dealt with "an agreement . . . between several commercial firms for three months not to sell India cotton bagging without the consent of the majority."¹⁰² The *North River* court emphasized that "[t]he [Louisiana] court in its decision, held that 'the agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters.'"¹⁰³ From this the New York court distilled the principle that an agreement is illegal if it constitutes a combination among producers of necessities through which the supply of those necessities is curtailed and their prices to consumers artificially elevated.¹⁰⁴

97. *Id.* at 384, 7 N.Y.S. at 414.

98. *Id.* at 379-80, 7 N.Y.S. at 411.

99. The statute is quoted in part in *North River*, 61 N.Y. Sup. Ct. at 380, 7 N.Y.S. at 411. An earlier version of the statute was applied in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 184-89 (1871); *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 403-07 (N.Y. Sup. Ct. 1862); *Hooker & Woodward v. Vandewater*, 4 Denio 349, 352-54 (N.Y. Sup. Ct. 1847).

100. 61 N.Y. Sup. Ct. at 380-82, 7 N.Y.S. at 412-13.

101. 14 La. Ann. 168 (1859).

102. 61 N.Y. Sup. Ct. at 381, 7 N.Y.S. at 412, quoting *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168, 169 (1859).

103. *Id.*

104. 61 N.Y. Sup. Ct. at 383, 7 N.Y.S. at 413. For other cases dealing with the common law of combinations in restraint of trade, see, e.g., *Richardson v. Buhl*, 77 Mich. 632, 658, 43 N.W. 1102, 1110 (1889); *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558, 565-67 (1877); *Craft v. McConoughy*, 79 Ill. 346, 350-51 (1875).

As has already been noted,¹⁰⁵ intent was not determinative of the enforceability of a contract in restraint of trade. If it is accepted, as the cases reflect and as the Judiciary Committee recognized, that a combination in restraint of trade was a distinct legal phenomenon, of what significance was the intent of the parties to the combination in determining its enforceability at common law?¹⁰⁶

Intent is not addressed in the cases on combinations. The preponderance of cases decided prior to the enactment of the Sherman Act arose out of combinations of producers or suppliers that had already succeeded in monopolizing a given commodity. As the California Supreme Court's decision in *Santa Clara Valley Mill & Lumber Co. v. Hayes*¹⁰⁷ demonstrates, motive and intent under these circumstances were legally inconsequential, for the resulting restraint of trade was manifestly unreasonable, regardless of why it had been brought about by the participants.¹⁰⁸

In *Santa Clara Valley*, plaintiff, the owner of four sawmills in the region of Felton, California, entered into agreements in 1881 with all other sawmill owners in the area

to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactured near Felton for the year 1881, and control of the supply of lumber for that year in [a four-county area surrounding Felton].¹⁰⁹

The combination also had the effect of eliminating the wholesale market for lumber at Felton and sharply curtailing the supply of lumber available to dealers.¹¹⁰ Defendants, two owners of mills in competition with plaintiff's, were parties to the combination. They had agreed to manufacture only a limited amount of lumber and to sell all of it to plaintiff at \$11 per thousand feet.¹¹¹ They also agreed to pay plaintiff \$20 per thousand board feet for any lumber sold to anyone in the four-county area other than plaintiff.¹¹² When defendants failed to abide by this agreement, plaintiff brought an action to recover damages. Defendants urged that the agreement was void and unenforceable because it was a combination that unreasonably restrained trade.

105. See text accompanying notes 86, 87 *supra*.

106. As the succeeding discussion of conspiracy law will emphasize, contracts and combinations in restraint of trade were not indictable offenses (except in a state, such as New York, with special statutory provisions) and created no cause of action in third parties who might be injured as a result of the restraint. They simply rendered the underlying agreement unenforceable between the parties. See text accompanying notes 115-58 *infra*.

107. 76 Cal. 387, 18 P. 391 (1888).

108. Decisions under § 2 of the Sherman Act share the recognition that, once monopolization is obtained and anticompetitive effect is consummated, the only issue remaining is whether the monopolist arrived at market dominance consciously. See note 29 *supra* and note 291 *infra*.

109. 76 Cal. at 389, 18 P. at 392.

110. *Id.*

111. *Id.* at 388-89, 18 P. at 391.

112. *Id.* at 389, 18 P. at 391.

The Supreme Court of California did not analyze the intent of the parties, because the restraint effected by the combination had unmistakably injured the public. It concluded that the agreement was unenforceable: "[Plaintiff] entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract."¹¹³

In this and similar cases the courts thus found it unnecessary to determine whether the intent to restrain trade would by itself convert an otherwise reasonable combination into an unreasonable restraint of trade. Since, however, combinations in restraint of trade are a type of contract in restraint of trade, the logic of *Diamond Match Co. v. Roeber* would naturally apply.¹¹⁴ anticompetitive intent would not alone make a restraint unreasonable.

2. Conspiracy in Restraint of Trade

A contract in restraint of trade was void and unenforceable, and created no cause of action on the part of third parties injured by acts done pursuant to that contract. A conspiracy in restraint of trade, however, was actionable at the instance of injured third parties under limited circumstances. In addition, a conspiracy was a criminal offense by statute in New York and by common law in certain other jurisdictions.¹¹⁵

By the date of passage of the Sherman Act, conspiracy was well-

113. *Id.* at 392, 18 P. at 393. In so holding, the court relied heavily upon *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1877), a case in which plaintiff's assignor and defendant had combined to control the entire supply of anthracite coal in western New York. The *Arnot* court held that the plaintiff's assignor, The Butler Colliery Company, could not recover the price of coal delivered pursuant to the combination from defendant, a competitor that was also engaged in the distribution of coal in western New York. The court reasoned that the agreement was void and unenforceable:

The defendant . . . endeavored by this agreement to keep all of the coal of that company out of the market, except the limited amount which it agreed to take, and thus to artificially enhance the price of that necessary commodity. This purpose was the basis of the whole agreement, and, as is found by the referee, was understood by both parties at the time of entering into the contract.

That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day.

Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited. Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts.

Id. at 565-66 (citations omitted).

114. See text accompanying notes 77-88 *supra*.

115. See text accompanying notes 120-22 *infra*.

defined at common law.¹¹⁶ Lord Coleridge summarized the law of conspiracy as it applied to joint activity affecting commercial affairs in the English case of *Mogul Steamship Co. v. McGregor, Gow & Co.*:¹¹⁷

If the combination is unlawful, then the parties to it commit a misdemeanour, and are offenders against the State; and if, as the result of such unlawful combination and misdemeanour, a private person receives a private injury, that gives such person a right of private action.

It is, therefore, no doubt necessary to consider the object of the combination as well as the means employed to effect the object, in order to determine the legality or illegality of the combination. And in this case it is clear that if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants, and a person injured by their misdemeanour has an action in respect of his injury.¹¹⁸

This summary was the generally accepted formulation of the law of conspiracy as it pertained to restraints of trade.¹¹⁹

There were also criminal statutes governing conspiracies in restraint of trade. Prior to 1890, for example, a New York statute made it a misdemeanor to conspire "to commit any act injurious to trade or commerce."¹²⁰ The application of this statute was consistent with the common-law principles under which the enforceability of contracts in restraint of trade was evaluated,¹²¹ and it appears that application of the statute was confined to cases in which enforceability was the principal issue.¹²² Its application casts no light on the law of conspiracies in restraint of trade and will not be reviewed here. For illumination of the law of conspiracies in restraint of trade other sources must be consulted.

*Bowen v. Matheson*¹²³ is illustrative of the operation of common-law conspiracy doctrines as applied to restraints of trade. In *Bowen*, plaintiff, a

116. For a thorough discussion of the evolution of conspiracy from the ancient writ of conspiracy, see generally *State v. Buchanan*, 5 H. & J. 317, 333-59 (Md. 1821); *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149-51 (1737).

117. 21 Q.B.D. 544 (1888), *aff'd*, 23 Q.B.D. 598 (C.A. 1889), *aff'd*, [1892] A.C. 25 (1891).

118. 21 Q.B.D. at 549-50. During early debate on S. 1, Senator George defined conspiracy as "a combination or agreement of two or more to do an unlawful act or to do a lawful act in an unlawful manner." 21 CONG. REC. 1771 (1890).

119. See text accompanying notes 123-58 *infra*.

120. 2 N.Y. Rev. Stat. 691, § 8, *quoted in* *Hooker & Woodward v. Vandewater*, 4 Denio 349, 352 (N.Y. Sup. Ct. 1847).

121. See *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 184-88 (1871) (applying a New York statute); *Stanton v. Allen*, 5 Denio 434, 441-43 (N.Y. Sup. Ct. 1848).

122. See *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848); *Hooker & Woodward v. Vandewater*, 4 Denio 349 (N.Y. Sup. Ct. 1847); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871) (applying a New York statute). See also *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558, 565 (1876) (*citing Stanton, Hooker & Woodward and Morris Run Coal Co.*). Cf. *People v. North River Sugar Refining Co.*, 61 N.Y. Sup. Ct. 354, 380-84, 7 N.Y.S. 406, 411-13 (1889) (statute discussed in connection with proceeding to dissolve corporation); *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 404 (N.Y. Sup. Ct. 1862) (comparable statute governing manufacture and sale of salt).

123. 96 Mass. (14 Allen) 499 (1867).

shipping master engaged in the business of providing seamen for employment, alleged that his competitors had conspired to force him out of business.¹²⁴ Specifically, he asserted that defendants had, among other things, attempted to prevent any of their seamen from shipping in any vessel in which a member of the crew was not provided by a member of defendant's association. Plaintiff alleged that this had been done in order to maintain a uniform wage rate for the seamen employed by the defendants.¹²⁵

In ruling on the case, the Supreme Judicial Court of Massachusetts noted that the action stated a claim only if the defendants had committed "illegal acts" against plaintiff. The court also observed that the allegation that the acts were done pursuant to a conspiracy added nothing to plaintiff's claim for relief.¹²⁶ After considering each of the acts complained of and the constitution and by-laws of the Association, the court sustained a demurrer to the complaint:

We can see nothing criminal in any of these stipulations; . . . and nothing illegal. If their effect is to destroy the business of shippingmasters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits. New inventions and new methods of transacting business often destroy the business of those who adhere to old methods. Sometimes associations break down the business of individuals, and sometimes an individual is able to destroy the business of associated men. It would be nothing novel if the plaintiff in the exercise of his ingenuity should in his turn adopt some improvement that shall compel the defendants to dissolve their connection. As the declaration set forth no illegal acts on the part of the defendants, the demurrer must be sustained.¹²⁷

In reaching this conclusion, the Massachusetts court followed its earlier ruling in *Commonwealth v. Hunt*,¹²⁸ in which Chief Justice Shaw reviewed the law of conspiracy in connection with a criminal charge against bootmakers who had agreed not to work for any manufacturer that employed a bootmaker who was not a member of their association. The third count of the indictment in *Hunt* had charged that defendants had conspired with "wicked and unlawful intent" to drive a competitor, Jeremiah Horne, out of business.¹²⁹ Chief Justice Shaw, who had earlier in the opinion defined conspiracy as "a combination of two or more persons [who], by some concerted action, [seek] to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means . . .,"¹³⁰ held that the count

124. *Id.* at 500-01.

125. *Id.*

126. *Id.* at 502.

127. *Id.* at 503-04.

128. 45 Mass. (4 Met.) 111 (1842).

129. *Id.* at 133.

130. *Id.* at 123.

was insufficient because the object, competition, was not unlawful and the indictment did not charge any unlawful means by which that object was to be accomplished:

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment.¹³¹

The *Hunt* case did not specifically discuss the significance of the actors' intent in a conspiracy, nor did it indicate whether a conspiracy in restraint of trade would be unlawful if it had no unlawful object and was not to be carried out by unlawful means, but its participants were motivated by anticompetitive intent. The Minnesota Supreme Court, however, had occasion to address these questions in a case decided shortly after passage of the Sherman Act. Relying upon precedents contemporaneous with and antecedent to the Act's enactment, that court held, in *Bohn Manufacturing Co. v. Hollis*,¹³² that the presence of such intent had no significance.

Plaintiff in *Bohn Manufacturing* was a manufacturer and vendor of lumber and other building materials, and sold its products at both wholesale and retail in Minnesota and adjoining states.¹³³ Defendants were an association of retail lumber dealers and its secretary.¹³⁴ Plaintiff, in common with certain other manufacturers and wholesalers, supported the association and committed himself in principle to deal only with retailers.¹³⁵ When the secretary of the association discovered that plaintiff had on two occasions sold lumber directly to contractors or consumers, the association demanded that plaintiff pay over ten percent of the amount of the sales.¹³⁶ Plaintiff balked, and the secretary indicated that, unless the payment was made, he would, pursuant to a formal publication procedure, notify the retail members of the association of the plaintiff's betrayal.¹³⁷

Plaintiff brought suit to enjoin the secretary from acting, alleging that publication of the notice would result in the refusal of the association's

131. *Id.* at 134.

132. 54 Minn. 223, 55 N.W. 1119 (1893).

133. *Id.* at 230, 55 N.W. at 1119.

134. *Id.* at 224, 55 N.W. at 1119.

135. *Id.* at 230, 55 N.W. at 1120.

136. *Id.*

137. *Id.* at 230-31, 55 N.W. at 1120.

retail members to deal with it, causing it, in turn, to lose revenue and profits. The trial court granted the injunction.¹³⁸ Defendants appealed, and the Minnesota Supreme Court dissolved the injunction and reversed.

At trial and on appeal, plaintiff asserted that the members of the association had engaged in a conspiracy to restrain trade designed to drive it out of business.¹³⁹ The court observed that the intent of the members of the association was immaterial:

If an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, “the exercise by one man of a legal right cannot be a legal wrong to another”, or, as expressed in another case, “malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.” *Heywood v. Tillson*, 75 Me. 225; *Phelps v. Nowlen*, 72 N.Y. 39; *Jenkins v. Fowler*, 24 Pa. St. 308.¹⁴⁰

Thus, if a restraint of trade had been caused by a conspiracy among businessmen, the conspiracy was not unlawful or actionable, even if the participants intended to curtail competition, unless the object of the conspiracy or the means used to achieve that object were unlawful. Other cases clearly establish that the intent to curtail competition was not an unlawful object.

The role of intent was carefully reviewed in *Mogul Steamship Co. v. McGregor, Gow, & Co.*,¹⁴¹ an English case. In that case, plaintiffs were a group of shipowners who operated the steamships *Sikh*, *Afghan*, *Pathan*, and *Ghazee* between Australia and England, stopping at China en route.¹⁴² Defendants, a group of rival shipowners who ran tea-bearing ships between China and England, had formed among themselves a “conference” pursuant to which they paid a five percent rebate to all exporters, based principally at the ports of Shanghai and Hankow, who shipped their tea exclusively on the defendants’ vessels.¹⁴³ The conference was formed in 1884, and plaintiffs were initially admitted as members.¹⁴⁴ They were excluded in 1885 and brought an action for damages.¹⁴⁵

Lord Coleridge, the trial judge in the Queen’s Bench Division, characterized the allegations of the complaint as follows: “[T]he defendants unlawfully combined or conspired to prevent the plaintiffs from carrying on their trade, that they did prevent them by the use of unlawful means in furtherance of such unlawful combination or conspiracy, and that from such unlawful combination or conspiracy

138. *Id.* at 231, 55 N.W. at 1120.

139. *Id.* at 225, 229, 231-32, 55 N.W. at 1120-21.

140. *Id.* at 233, 55 N.W. at 1121.

141. 21 Q.B.D. 544 (1888), *aff’d*, 23 Q.B.D. 598 (C.A. 1889), *aff’d*, [1892] A.C. 25 (1891). *See text accompanying notes 117-18 supra.*

142. 21 Q.B.D. at 544-45, 547.

143. *Id.* at 547.

144. *Id.* at 545.

145. *Id.* at 547.

therefore damage has resulted to the plaintiffs."¹⁴⁶ In the course of reviewing the plaintiffs' contentions, Lord Coleridge addressed intent.¹⁴⁷ Plaintiffs had urged that the defendants had intended to conspire to ruin them. The court agreed that a "wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this,"¹⁴⁸ but concluded that the facts showed no malicious intent:

The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill will to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought, and honestly and, as it turns out, correctly thought, that for a time at least there would be an end of their gains.¹⁴⁹

The Court of Appeal affirmed this conclusion.¹⁵⁰ Some of the observations of the members of the court bear directly upon whether an intent to curtail competition could convert joint action in restraint of trade into an actionable or unlawful conspiracy. Judge Bowen noted that an intention to prevail over one's trade rivals falls far short of the evil motive needed for a conspiracy:

[T]here was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.¹⁵¹

Judge Fry concurred in the view that an intent to prevail over trade rivals was not an unlawful object which would make a conspiracy actionable:

These are, so far as I am aware, all the relevant authorities, and none of them appears to me to support the proposition that mere competition of one set of men against another man carried on for the purpose of gain and not out of actual malice is actionable, even though intended to drive the rival in trade

146. *Id.* at 548.

147. *Id.* at 552-53.

148. *Id.* at 553.

149. *Id.* at 554.

150. 23 Q.B.D. 598 (C.A. 1889).

151. *Id.* at 614-15.

away from his place of business, and though that intention be actually carried into effect.¹⁵²

The House of Lords in turn affirmed the judgment of the Court of Appeal.¹⁵³ The opinions of the members of the House of Lords deserve attention not only because they thoroughly discuss the role of motive in such a conspiracy, but also because, as Justice White noted in the *Standard Oil Co.* case, they "serve . . . reflexly to show the exact state of the law in England at the time the [Sherman] Antitrust statute was enacted."¹⁵⁴

Lord Halsbury found no unlawful object, that is, a malicious intention to injure plaintiffs, on the part of defendants:

And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.¹⁵⁵

This view was shared by Lord Hannen, who distinguished an intent to injure plaintiffs from an intent, on the part of defendants, to promote their own commercial position:

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer.¹⁵⁶

While the English courts' denial of relief in *Mogul Steamship* may seem harsh, the result was mandated by the doctrine that a third party could not challenge an unreasonable restraint of trade unless it was carried out pursuant to a conspiracy that caused the party special injury.¹⁵⁷

152. *Id.* at 632.

153. [1892] A.C. 25 (1891).

154. *Standard Oil Co. v. United States*, 221 U.S. 1, 56 (1911).

155. [1892] A.C. at 36-37.

156. *Id.* at 60.

157. As Judge Taft observed, certain members of the House of Lords had ventured the view that the agreement forming the conference was a contract that unreasonably restrained trade. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 286 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). As such, it would fall within the reach of § 1.

Competitive injury fell far short of the proof necessary to establish an actionable or unlawful conspiracy, which required instead proof of an unlawful object or of the accomplishment of a lawful object by unlawful means. In order to prove an unlawful object, it was necessary to demonstrate a malicious intent aimed at the ruin of a rival, and not merely an intent to enhance one's competitive position.¹⁵⁸

3. *Summary of the State of the Common Law*

In short, at common law, intent did not enter into the determination of whether a contract or combination was an unreasonable restraint of trade. Correspondingly, an action for conspiracy could not be predicated upon a party's intention to secure competitive advantages and prevail over trade rivals. A conspiracy action required proof of unlawful means or an unlawful object, not an intention to improve one's competitive position.

The common-law doctrines applicable to joint commercial activity were, therefore, already highly developed by the time the Sherman Act was adopted. As embodied in section 1, they produce these clear-cut results: A restraint is unlawful under section 1 of the Act if it has the requisite impact on interstate commerce and is the product of a contract, combination, or conspiracy that unreasonably restrains trade, as defined at common law prior to passage of the Act. Conversely, joint conduct is not unlawful under section 1, even if it has a substantial impact on interstate commerce, if it is not a contract, combination, or conspiracy that unreasonably restrains trade, as defined at common law on the eve of passage of the Act.

Given this framework, we now turn to a consideration of the cases that apply section 1 to two-firm refusals to deal, and to a determination whether the courts have correctly understood the limited significance of intent under section 1.

III. APPLICATION OF SECTION 1 TO REFUSALS TO DEAL

Decades passed before the courts were called upon to apply section 1

158. *Accord*, *Macaulay Bros. v. Tierney*, 19 R.I. 255, 33 A. 1, 4 (1895); *Plant v. Woods*, 176 Mass. 492, 501-02, 57 N.E. 1011, 1014 (1900) ("The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed . . . , even to the injury of their rivals.").

It was announced in *Commonwealth ex rel. Chew v. Carlisle*, Brightly's Report 36 (Pa. Nisi Prius 1821), a case in which the legality of a combination of master shoemakers to regulate wages of their employees was at issue, that "the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful acts is, in this class of cases [*i.e.*, a conspiracy to do a lawful act by lawful means], the discriminative circumstance." *Id.* at 39. This statement was deemed in later Pennsylvania decisions to mean that a combination to do a lawful act by lawful means could nonetheless constitute a conspiracy when undertaken with a motive "to oppress." *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 187 (1871). *See also* *Commonwealth v. Tack*, 1 Brewst. 511, 513, 517 (C.P. Pa. 1868). The second part of this conclusion is correct; the first is not. As Lord Coleridge observed in *Mogul S.S. Co.*, acts undertaken with a malicious motive seeking the ruin of a competitor may serve as the predicate for a conspiracy action because their object, *i.e.*, the infliction of malicious injury, is unlawful. 21 Q.B.D. at 549-50. To speak, however, of joint conduct with a lawful object but an unlawful motive, as the Pennsylvania decisions do, is to create a contradiction, since a malicious motive in legal contemplation is the same as an unlawful object.

to a two-firm refusal to deal, that is, a refusal pursuant to agreement between a single supplier and single customer. Although concerted refusals to deal pursuant to agreement between suppliers¹⁵⁹ or customers¹⁶⁰ had engaged the attention of the courts quite early, dealer substitutions, terminations, and other conduct now integral to many manufacturers' distribution systems were typically challenged by disappointed customers, if at all, under common law contract principles that governed the validity and termination of agency and distributorship arrangements.¹⁶¹ A brief look at one such case will demonstrate how these principles were applied without regard to section 1.

In *Bach v. Friden Calculating Machine Co.*¹⁶² plaintiff alleged that defendant Friden, a manufacturer of calculating machines, had wrongfully terminated its dealership agreement with the partnership (Bach) owned by the plaintiffs. Friden had appointed Bach in 1935 to purchase and resell its machines in the Cincinnati area.¹⁶³ In 1942, however, Friden decided to convert the appointment to an agency and reduce the commissions paid Bach.¹⁶⁴ It sent Bach a "Sales Agent's Agreement" in 1944 for signature, but plaintiffs refused to sign it.¹⁶⁵ Friden thereupon advised them that the distributorship would be terminated as of June 15, 1944.¹⁶⁶ Friden appointed a new distributor, Gunderson, who informed plaintiffs that he would replace them.¹⁶⁷

Bach brought a diversity action against Friden and Gunderson seeking to obtain an injunction against the termination. They apparently urged that their appointment was to "continue during their lifetime, or at least during such time as they continued to devote their best efforts to the promotion and sale of the Friden calculator."¹⁶⁸ The district court entered judgment for defendants on the grounds, among others, that the distributorship contract was unenforceable for want of consideration and lack of mutuality and, in any event, was terminable at the will of either party.¹⁶⁹

The Court of Appeals for the Sixth Circuit affirmed. It first held that the contract rested on adequate consideration and was not void for lack of mutuality.¹⁷⁰ It then ruled that the contract was not terminable at will, but

159. See, e.g., *United States v. New England Fish Exch.*, 258 F. 732 (D. Mass. 1919).

160. See, e.g., *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914); *Ballard Oil Terminal Corp. v. Mexican Petroleum Corp.*, 28 F.2d 91, 97-99 (1st Cir. 1928).

161. For representative annotations collecting pertinent cases and addressing the availability of equitable relief in the case of threatened termination, see Annot., 145 A.L.R. 684 (1943), and Annot., 125 A.L.R. 1446 (1940).

162. 155 F.2d 361 (6th Cir. 1946).

163. *Id.* at 363.

164. *Id.* at 364.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 365.

169. *Id.* at 364.

170. *Id.* at 364-65.

rather could be terminated only upon reasonable notice, and went on to hold that the reasonableness of the notice that had been given was a question of fact for the trial court to determine.¹⁷¹ The court found it unnecessary, however, to decide whether the contract was in fact to have continued in effect for the period asserted by Bach since it concluded that injunctive relief would not be available under any circumstances. The court reasoned that the continued judicial supervision necessary for an effective injunction would be impractical.¹⁷² It affirmed the dismissal with leave for plaintiffs to pursue any legal remedies they might have for breach of contract.¹⁷³

By the 1930s litigants in cases with facts comparable to those of *Bach* had begun to invoke section 1. One of the first reported cases along these lines is *Arthur v. Kraft-Phenix Cheese Corp.*¹⁷⁴ Plaintiff (Arthur) had been the sole Baltimore distributor of mayonnaise and one of several distributors of cheese manufactured by Kraft-Phenix Cheese Corp. (Kraft).¹⁷⁵ As of January 11, 1934, Kraft ceased selling to plaintiff at a distributors' discount,¹⁷⁶ and plaintiff brought suit, alleging that this termination was part of a conspiracy among Kraft, certain of its employees, and a competing cheese distributor, Carpel.¹⁷⁷ Specifically, Arthur alleged that Kraft had conspired

" . . . to force the plaintiff out of the plaintiff's lucrative business in the defendant's said cheese and mayonnaise products if the plaintiff should refuse to buy out said Carpel's business at and for a consideration of \$10,000, or refuse to sell his said business in the defendant's said products to the said Carpel for the sum of \$15,000"; and on the plaintiff's refusal to so either buy or sell, the defendant thereafter refused to sell to the plaintiff the defendant's products *at a dealer's discount*.¹⁷⁸

The district court held that the complaint failed to state a violation of the federal antitrust laws. The court reasoned that "[e]ssentially what is complained of is a private wrong or common law tort in which the public interest is not involved,"¹⁷⁹ and held that the allegation of conspiracy between Kraft and Carpel added nothing to the complaint.¹⁸⁰ It reached this conclusion even though Arthur alleged that the refusal was arbitrary and "without reasonable justification or excuse".¹⁸¹

In fact, taking all the averments of the declaration together there is really

171. *Id.* at 365.

172. *Id.* at 366.

173. *Id.*

174. 26 F. Supp. 824 (D. Md. 1937).

175. *Id.* at 827.

176. *Id.* at 825, 827.

177. *Id.* at 827.

178. *Id.* (emphasis in original).

179. *Id.* at 828.

180. *Id.* at 829-30.

181. *Id.* at 825.

nothing to indicate that the defendant's refusal to further sell the plaintiff at a discount resulted otherwise than from "its right to select its own customers and was not in restraint of trade". *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U.S. 441, 452 And even though, as the declaration alleges, this right was exercised arbitrarily and unreasonably by the defendant, nevertheless it does not justify a suit under Section 15 [Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976)] unless the effect of the refusal was to substantially lessen competition and was in restraint of trade.¹⁸²

There is no need to detail the cases subsequently decided which reached the same result on comparable facts.¹⁸³ Instead, our attention can more profitably be directed toward a later decision that accurately reflected the state of the law as of 1963, *Ace Beer Distributors, Inc. v. Kohn, Inc.*¹⁸⁴ In that case, plaintiff, Ace Beer Distributors, Inc. (Ace Beer), alleged that it and its predecessor had been the exclusive distributor of Stroh beer in Mahoning and Youngstown counties in Ohio since 1936.¹⁸⁵ Defendant Stroh Brewery Company (Stroh) was the sole source of supply for Ace Beer, which acted as a distributor only for Stroh.¹⁸⁶ Ace Beer alleged that Stroh and its codefendants had "maliciously conspired to destroy plaintiff's business and to eliminate plaintiff as a beer distributor in interstate commerce."¹⁸⁷ Specifically, it asserted that Stroh had secretly reached agreement with The Kohn Beverage Company, an existing Youngstown, Ohio, business, under which Kohn would form a new company, Kohn, Inc., that would be made the sole Stroh distributor in the area served by Ace Beer.¹⁸⁸ As part of the agreement, Stroh would cancel Ace Beer's franchise.¹⁸⁹ Kohn, Inc., obtained a permit to distribute the beer from the Ohio Department of Liquor Control on April 17, 1959. Stroh cancelled Ace Beer's franchise on April 20, and appointed Kohn, Inc., in its place.¹⁹⁰ Pursuant to a second prearranged agreement, the key employees of Ace Beer departed *en masse* and joined Kohn, Inc.¹⁹¹

Defendants moved to dismiss the complaint for failure to state a claim under section 1. The district court granted the motion,¹⁹² and the Court of

182. *Id.*

183. See, e.g., *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420-21 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Bascom Launder Corp. v. Telecoin Corp.*, 204 F.2d 331, 334-35 (2d Cir.), *cert. denied*, 345 U.S. 994 (1953); *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519, 522 (10th Cir. 1950); *Alexander v. Texas Co.*, 149 F. Supp. 37, 43-44 (W.D. La. 1957)(dictum); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 903-07 (D. Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-99 (S.D.N.Y. 1942), *aff'd by equally divided Court*, 321 U.S. 707, 719 (1944).

184. 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963).

185. *Id.* at 285.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 285-86.

191. *Id.* at 286.

192. *Id.* at 284.

Appeals for the Sixth Circuit affirmed. The court of appeals characterized the complaint as follows:

In essence, the complaint charges that the defendants conspired to destroy plaintiff's business and to eliminate it as a beer distributor in interstate commerce and that this result was accomplished by the termination by Stroh of plaintiff's franchise as its beer distributor and thereafter conducting its business through another distributor.¹⁹³

Despite Ace Beer's allegations of "malicious" conspiracy to destroy its business, the court focused on the effect of the refusal to deal. It concluded that the refusal, as alleged, had no effect on competition, and therefore was not actionable under section 1:

The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.

The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States v. E. I. DuPont De Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 944, 100 L. Ed. 1264.

Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted "restraint of trade" within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result.

. . . The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade.¹⁹⁴

Other courts adopted the Sixth Circuit's analysis,¹⁹⁵ and it was apparently understood that the intent behind a conspiracy between a supplier and a customer to eliminate another customer was, at the most, relevant only insofar as it assisted in evaluation of the effect of the conspiracy.¹⁹⁶ The test of illegality under the rule of reason was, as the Supreme Court had early observed in *Chicago Board of Trade*,¹⁹⁷

193. *Id.* at 286.

194. *Id.* at 287.

195. See, e.g., *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1214 (9th Cir. 1970); *Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir.), *cert. denied*, 391 U.S. 916 (1968); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 7 (9th Cir. 1963).

196. See text accompanying notes 7, 19 *supra*.

197. The court noted in *Kohn* that a manufacturer could select its customers and refuse to sell to others "for reasons sufficient to itself." 318 F.2d at 286. Following *Kohn*, the district court in *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039, 1047 (E.D. Mich. 1976), stated that "the reason for refusal to deal is immaterial, provided it did not unreasonably restrain trade."

anticompetitive effect. However, intent soon acquired far greater importance.

Beginning with the Ninth Circuit's decision in *Cartrade, Inc. v. Ford Dealers Advertising Association*,¹⁹⁸ the "anticompetitive reasons," if any, of a supplier became a criterion employed by some courts to evaluate the legality of a two-firm refusal to deal. In *Cartrade*, it was alleged by plaintiff, a firm that acted as an information clearinghouse on the inventories of all Ford dealers who were members of the defendant Ford Dealers Advertising Association of Southern California (FDAA), that FDAA had conspired with Ford Motor Company to terminate its relationship and substitute another cartrader for it.¹⁹⁹

Cartrade's contract was with FDAA, a corporation that had appointed it in 1965 to act as the exclusive cartrader for all its members.²⁰⁰ Ford sent Cartrade an IBM print-out that contained information on all vehicles shipped to each dealer in FDAA, and it was thus able to monitor the inventories of the dealers with minimum effort.²⁰¹ Ford ceased making IBM lists available to Cartrade in February 1966 and thereafter sent them directly to FDAA for disposition.²⁰² FDAA advised Cartrade it was terminating its contract at the end of February 1966.²⁰³ As of March 1, 1966, FDAA obtained its cartrading information exclusively from a new firm, Dealers Trade, to whom it made available Ford's IBM lists.²⁰⁴

At the close of plaintiff's case, the district court directed a verdict in favor of defendants.²⁰⁵ The Court of Appeals for the Ninth Circuit affirmed on two grounds. It held, as the Sixth Circuit had in *Ace Beer*, that the substitution of Dealers Trade for Cartrade had no effect on competition and was, therefore, outside the reach of section 1.²⁰⁶ Unlike the Sixth Circuit, however, it went on to inquire whether the substitution was undertaken for "anticompetitive reasons."²⁰⁷ Only after finding none did it hold that the claim was not actionable under section 1.²⁰⁸

The court's inquiry into the reasons for a refusal to deal constituted a departure from the prevailing analysis of the legality of two-firm refusals under section 1. While such an inquiry is clearly proper, as the Supreme Court had noted in *Chicago Board of Trade*,²⁰⁹ the inquiry in *Cartrade* was

198. 446 F.2d 289 (9th Cir. 1971).

199. *Id.* at 290-92.

200. *Id.* at 291.

201. *Id.*

202. *Id.* at 292.

203. *Id.*

204. *Id.*

205. *Id.* at 290.

206. *Id.* at 293-94.

207. *Id.* at 294.

208. *Id.*

209. 246 U.S. 231, 238 (1918). *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 47 U.S.L.W. 4359, 4364 (U.S. April 17, 1979) (purpose may be considered to the extent it "tends to

undertaken for reasons different than those previously recognized. In *Chicago Board of Trade* the Supreme Court had held that inquiry into the intent of the parties would be relevant only because knowledge of intent may assist a court in evaluating the effect of a restraint. In contrast, the court's inquiry in *Cartrade* rested on the assumption that evidence of anticompetitive reason or motive would by itself support a holding of illegality, irrespective of the presence of any adverse effect on competition. This assumption, previously unarticulated in the cases addressing two-firm refusals and without a basis in the common law upon which the Sherman Act stands, originated in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*²¹⁰ and certain Supreme Court dicta.

Preliminarily, it should be noted that *Hawaiian Oke* did not arise from a two-firm conspiracy. The conspiracy at issue in that case was among competing suppliers and a prospective customer, with the goal of replacing an existing, common customer of the suppliers.²¹¹ As the following discussion will show, recognition of the distinction between a two-firm vertical conspiracy and the tripartite conspiracy under review in *Hawaiian Oke* is crucial for a proper analysis of the case and its proper application as precedent. In situations such as that confronting the court in *Hawaiian Oke*, the intent of the actors determines whether the tripartite conspiracy is *per se* illegal or is instead subject to evaluation under the rule of reason. Intent in a vertical two-firm conspiracy, on the other hand, is simply a datum to be taken into account in evaluating anticompetitive effect under the rule of reason.

Hawaiian Oke & Liquors, Ltd., (Hawaiian Oke) was the sole distributor in Hawaii of certain alcoholic beverages produced by Joseph E. Seagram & Sons, Inc. (Seagram).²¹² It was also the sole Hawaiian distributor of certain alcoholic beverages produced by Barton Distilling Company (Barton).²¹³ Other products of Seagram and Barton were distributed in Hawaii by McKesson & Robbins, Inc., (McKesson), a competitor of Hawaiian Oke.²¹⁴

show effect"). The Supreme Court's approval of consideration of evidence of purpose or intent is consistent with the common law authorities discussed in the text accompanying notes 77-158 *supra*. Under the common-law decisions addressing the reasonableness of contracts and combinations in restraint of trade, the crucial inquiry was whether the restraint was productive of injury to competition. Review of evidence of purpose or intent was not foreclosed, but purpose or intent was not dispositive of the reasonableness of the restraint. See *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887), discussed in the text accompanying notes 77-87 *supra*.

Under the common-law decisions addressing whether an action for conspiracy in restraint of trade could be maintained, evidence of purpose or intent had the same limited significance. Even if an intent to achieve an unlawful object, *i.e.*, the destruction of plaintiff's business, was alleged, the dispositive issue was whether there was an unlawful object, not whether there was anticompetitive intent. See, *e.g.*, *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 134 (1842), and *Bohn Mfg., Co. v. Hollis*, 54 Minn. 223, 233, 55 N.W. 1119, 1121 (1893), discussed in the text accompanying notes 128-40 *supra*.

210. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

211. See text accompanying notes 213-21 *infra*.

212. 416 F.2d at 73.

213. *Id.*

214. *Id.*

In May 1965 one of Seagram's officers approached McKesson's vice-president with a proposal that McKesson take over Seagram's "Calvert" line, which, at that time, was distributed by Hawaiian Oke.²¹⁵ At a later date, Seagram proposed that McKesson also take over the "Four Roses" and "Frankfort" lines, then handled by Hawaiian Oke.²¹⁶ With these offers in mind, McKesson approached Barton and suggested that it become the Hawaiian distributor for Barton's products handled by Hawaiian Oke.²¹⁷ Barton agreed to McKesson's proposal, and McKesson, in turn, accepted Seagram's.²¹⁸

Seagram, through its separate "Calvert," "Four Roses," and "Frankfort" divisions, advised Hawaiian Oke in late June and early July 1965 that it would not renew its distributorship agreements.²¹⁹ Barton advised Hawaiian Oke in early July that it too was terminating its agreement and transferring its lines to McKesson effective August 31, 1965.²²⁰

Hawaiian Oke sued for damages under sections 1 and 2 of the Sherman Act, alleging that the terminations constituted a conspiracy among Seagram, Barton, and McKesson. Plaintiff dropped the section 2 claim before trial and pursued the case on its section 1 claims only.²²¹ The jury returned a verdict for plaintiff after receiving liability instructions later described by the court of appeals as follows: "The essence of these instructions is that any agreement between two or more suppliers who have been selling to or through distributor A to transfer their business to distributor B, who is also a party to the agreement, is a *per se* violation of section 1."²²²

Assuming that such a conspiracy was in fact supported by the record,²²³ the Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that the instructions were erroneous and that there was inadequate support in the record for the verdict.²²⁴ The court of appeals directed its attention²²⁵ to whether the agreement was *per se* illegal under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,²²⁶ and comparable cases holding that group boycotts are *per se* violations of section 1. After noting that "it is well settled that it is not a *per se* violation of the antitrust laws for

215. *Id.*

216. *Id.* at 73-74.

217. *Id.* at 73.

218. *Id.* at 73-74.

219. *Id.* at 74.

220. *Id.*

221. *Id.* at 72.

222. *Id.* at 75-76.

223. *Id.* at 74-75.

224. *Id.* at 80.

225. The court addressed other issues on appeal as well, including intra-corporate conspiracy, *id.* at 80-84, conscious parallelism, *id.* at 84-85, and damages, *id.* at 85-89.

226. 359 U.S. 207 (1959).

a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor,"²²⁷ the court turned to consider whether the case before it fell outside this principle and was instead subject to the *per se* boycott rule because of the presence of an agreement between horizontal competitors, Seagram and Barton.

The court held that the case was not subject to the boycott rule.²²⁸ It rested its conclusion on the ground that, in all cases in which a horizontal agreement among competitors was held to be a *per se* violation of section 1, "there was a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive objective, or both."²²⁹ In the case before it, however, "plaintiff presented no evidence whatever that either Seagram or Barton had any *anticompetitive* motive for terminating plaintiff as their distributor."²³⁰ Although acknowledging that under certain circumstances, not present in the case, an agreement to establish a common distributor could be shown to be an unreasonable restraint of trade,²³¹ the court held that the group boycott rule of *per se* illegality was simply inapplicable.²³²

The court's analysis in *Hawaiian Oke*, therefore, did not focus on assessing the legality under section 1 of an agreement between a single supplier and a single customer to refuse to deal with another customer. The legality of such an agreement was presumed: "[I]t [is] clear that the decision of the seller to transfer his business from A to B is valid even though B may have solicited the transfer and even though the seller and B may have agreed before the seller terminates his dealings with A."²³³ Rather, the court's concern was directed at determining what circumstances would cause a refusal to deal pursuant to a conspiracy involving horizontal competitors to be *per se* illegal under *Klor's* and related authorities.

The holding of *Hawaiian Oke* has been used as support for two distinct and divergent propositions. The first of these, the rule that a refusal to deal pursuant to joint action by horizontal competitors is *per se* illegal under section 1 only when carried out with anticompetitive intent,²³⁴ need not concern us here. The second stands at the heart of the present inquiry: a

227. 416 F.2d at 76.

228. *Id.* at 76-80.

229. *Id.* at 76.

230. *Id.* at 78 (emphasis in original).

231. *Id.*

232. *Id.* at 79-80.

233. *Id.* at 78.

234. Representative decisions recognizing this principle include *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 546-47 (5th Cir. 1978), *cert. denied*, 48 U.S.L.W. 3283 (Oct. 30, 1979); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1180-81 (D.C. Cir. 1978); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir. 1977); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *North Am. Soccer League v. National Football League*, 465 F. Supp. 665, 672-77 (S.D.N.Y. 1979).

refusal to deal violates section 1 if its purpose or effect is anticompetitive.

The second proposition, of course, was not addressed in *Hawaiian Oke*, yet the case has become its virtual cornerstone. *Cartrade*, citing *Hawaiian Oke* for just this principle, has already been discussed.²³⁵ The principle was promptly appropriated for application in two-firm refusal cases, as the following language from *Alpha Distributing Co. v. Jack Daniel Distillery*,²³⁶ a case decided by the Ninth Circuit in early 1972, demonstrates:

The critical inquiry in such "refusal to deal" cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. *Hawaiian Oke*, *supra*, at 77-78; *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 7 (9th Cir. 1963). This inquiry is primarily a factual one, and its resolution often requires determination of motive or intent.²³⁷

This misapplication of the holding in *Hawaiian Oke*, standing on an unwarranted extension of the court's boycott discussion into the setting of two-firm vertical agreements, has yielded a mass of cases endorsing the rule (usually in dicta) that a refusal to deal is illegal if actuated by anticompetitive intent.²³⁸ Indeed, the cases have become so numerous that the proposition has evolved into hornbook law. A recent decision by the Court of Appeals for the Ninth Circuit shows both how deeply embedded the proposition has become and the inevitable consequences of reliance upon it.

*Fount-Wip, Inc. v. Reddi-Wip, Inc.*²³⁹ arose out of a death struggle between two Chicago whipped cream entrepreneurs. In the mid-1960s, Chicago supported three dairies that produced whipping cream: Brookhill

235. See text accompanying notes 198-208 *supra*.

236. 454 F.2d 442 (9th Cir. 1972).

237. *Id.* at 452. *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), cited by the court along with *Hawaiian Oke*, has not been relied upon in other refusal to deal cases approving the "purpose or effect, or both" formula. In *Walker* a distributor of Lucky Lager beer alleged that the manufacturer of the beer had terminated it as a distributor pursuant to a combination with competing distributors because it was handling beers that competed with Lucky Lager. In holding that the alleged conspiracy was not *per se* illegal, the court speculated that it might nonetheless be an unreasonable restraint of trade because anticompetitive in "purpose or effect, or both." 323 F.2d at 7.

238. See, e.g., *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 961 n.3 (5th Cir. 1978), *vacated on other grounds by stipulation of the parties*, 521 F.2d 1206 (5th Cir. 1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 129 n.4 (2d Cir.) (en banc), *cert. denied*, 99 S. Ct. 340 (1978); *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 470 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248 (5th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972); *Air Freight Haulage Co. v. Ryd-Air, Inc.*, [1978-2] Trade Cas. (CCH) ¶ 62,321, at 75,941 (S.D.N.Y. 1978); *Robinson v. Magovern*, 456 F. Supp. 1000, 1005-06 (W.D. Pa. 1978); *Gerson-Ogden, Inc. v. Avon Products, Inc.*, [1978-2] Trade Cas. (CCH) ¶ 62,271, at 75,679 (S.D.N.Y. 1978); *Natrona Serv., Inc. v. Continental Oil Co.*, 435 F. Supp. 99, 108 (D. Wyo. 1977), *aff'd*, 598 F.2d 1294 (10th Cir. 1979); *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F. Supp. 643, 649 (E.D. Pa. 1975); *Mogul v. General Motors Corp.*, 391 F. Supp. 1305, 1312 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976).

239. 568 F.2d 1296 (9th Cir. 1978).

Farms, Super Whip Sales, and Instant-Whip.²⁴⁰ Fount-Wip and Reddi-Wip were competing producers of aerosol whipped cream topping.²⁴¹ The topping was marketed through franchised dairies, which in the Chicago area were either Brookhill Farms or Super Whip Sales.²⁴² All the production of Instant-Whip was used by its parent corporation, and it was not available as a franchisee.²⁴³ In 1964 Reddi-Wip acquired Super Whip Sales; and in 1965 it acquired Brookhill. At the time, Brookhill was a franchisee of Fount-Wip.²⁴⁴ Brookhill terminated its franchise in early 1968 and thereafter refused to deal with Fount-Wip.²⁴⁵

Fount-Wip and a sister corporation sued Reddi-Wip, Brookhill and others, alleging, among other things, that Brookhill's refusal to deal had the effect (since Reddi-Wip also controlled Super Whip Sales and Instant-Whip was not available as a franchisee) of excluding Fount-Wip from the Chicago market.²⁴⁶ After a jury returned a verdict for plaintiffs, the district court entered judgment for defendants notwithstanding the verdict and, in the alternative, granted defendants' motion for a new trial.²⁴⁷

The court of appeals reversed, holding that plaintiffs' section 1 claim raised factual issues which should not have been taken from the jury.²⁴⁸ The court first noted that a "refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act."²⁴⁹ It then held that whether the Brookhill termination was in fact a refusal to deal (as opposed to a mere failure in the attempted negotiation of terms for a renewal of the franchise) and whether the refusal was "a product of anticompetitive motive" were factual issues which could only have been decided by the jury.²⁵⁰ Focusing on Reddi-Wip's alter-ego, Lipsky, and the head of Fount-Wip, Lapin, the court described the evidence of anticompetitive motive, and its significance, as follows:

There was testimony that Lipsky had threatened to wipe out Lapin and that Lipsky had also taken steps to drive Lapin out of the New York market area. Moreover, evidence was abundant that personal enmity between the two men was long standing. To be sure, Lipsky's anticompetitive purpose was primarily founded in personal animosity. Fount-Wip and Reddi-Wip apparently did not view each other as competitors, and only after Reddi-Wip had acquired Brookhill did they become, even indirectly, trading partners.

240. *Id.* at 1298.

241. *Id.*

242. *Id.* at 1298-300.

243. *Id.* at 1298.

244. *Id.*

245. *Id.* at 1299.

246. *Id.* at 1300.

247. *Id.* at 1298.

248. *Id.* at 1301.

249. *Id.* at 1300.

250. *Id.*

Nevertheless, Lapin and Lipsky, warring through their separate corporations, chose to fight out their personal conflict on an economic battlefield. If defendants did conspire to drive Lapin out of business, then a combination in restraint of trade existed which fits within the plain words of the statute.²⁵¹

This reasoning conflicts sharply with the Sixth Circuit's analysis of *Ace Beer*. In *Ace Beer* plaintiff alleged that defendants had conspired to drive it out of business.²⁵² Yet, unlike the court in *Fount-Wip*, the court confined its attention to the effect on competition produced by the refusal, not upon the state of mind of the actors.²⁵³ The court in *Fount-Wip*, on the other hand, entirely ignored effect, holding instead that there is a violation of section 1 when a single-supplier, single-customer refusal to deal is undertaken with anticompetitive intent, regardless of whether an unreasonable restraint of trade results. *Hawaiian Oke* obviously does not support this conclusion, nor do any of the common-law cases upon which section 1 was premised or any later refusal to deal cases decided prior to *Hawaiian Oke*.²⁵⁴ The holding can be explained only as the inevitable product of decisions like *Cartrade* and *Alpha Distributing Co.*,²⁵⁵ which misappropriated the boycott analysis of *Hawaiian Oke* for use in a nonboycott context.

Hawaiian Oke is not, however, the sole source of the fallacy that anticompetitive intent alone is unlawful under section 1. As applied to single-supplier, single-customer refusals to deal, the proposition also springs from dicta in two Supreme Court opinions, *United States v. Columbia Steel Co.*²⁵⁶ and *Times-Picayune Publishing Co. v. United States*.²⁵⁷

In *Columbia Steel* the Court addressed the government's contention that the elimination, by acquisition, of a customer for the product of a competitor of the acquiring company was *per se* illegal under section 1.²⁵⁸ The Court rejected the argument, holding that the competitive effect of the vertical integration could not be presumed, but must instead be evaluated for reasonableness by reference to the acquisition's actual impact on the relevant market.²⁵⁹ In an opinion by Justice Reed,

251. *Id.* at 1301.

252. See text accompanying notes 187, 193 *supra*.

253. See text accompanying note 194 *supra*.

254. The holding is also at odds with the Supreme Court's recent decision in *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978), in which the Court observed that under either *per se* or rule of reason analysis "the inquiry is confined to a consideration of impact on competitive conditions." See also text accompanying note 288 *infra*.

255. See notes 198, 236 *supra*. See also *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972).

256. 334 U.S. 495 (1948).

257. 345 U.S. 594 (1953).

258. 334 U.S. at 520-21.

259. *Id.* at 521-23.

the Court distinguished *United States v. Yellow Cab Co.*,²⁶⁰ the case upon which the government had relied for its *per se* argument:

In the complaint [in *Yellow Cab*] the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. *A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.* For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*.²⁶¹

The Court cited no authority for the italicized language, and none appears in *Yellow Cab*. The language has possible application to proof of an attempt to monopolize,²⁶² but the Court was not addressing a section 2 issue.²⁶³ The language is in fact groundless dictum, squarely conflicting with the Court's holding in *Chicago Board of Trade* that intent alone is not dispositive of the legality of a combination under section 1.²⁶⁴ And, of course, it goes without saying that the rule conflicts with the common law of contracts and conspiracies on which the Sherman Act stands.²⁶⁵

Justice Reed's statement was repeated by Justice Clark in *Times-Picayune*. In that case, the government challenged a New Orleans newspaper's practice of linking the sale of advertising in morning and evening newspapers. After concluding that the link did not constitute a tying arrangement (which is *per se* unlawful under section 1), the Court turned its attention to the legality of the practice "under the Sherman Act's general prohibition on unreasonable restraints of trade."²⁶⁶ It then summarized the tests of legality under the rule of reason:

260. 332 U.S. 218 (1947).

261. 334 U.S. at 522-23 (footnotes omitted) (emphasis added).

262. The intent required to prove attempted monopolization is "specific intent"; an intent which goes beyond the mere intent to do the act." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). What is required is a "specific intent to destroy competition or build monopoly." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953). See also *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 54 (2d Cir. 1979).

263. See 334 U.S. at 519. The Court also observed that a restraint not unreasonable could be unlawful if the actor had a specific intent to restrain trade unreasonably. *Id.* at 525, 525 n.24, citing the intent discussion in *United States v. Griffith*, 334 U.S. 100, 105 (1948), a § 2 monopolization case.

264. 246 U.S. 231, 238 (1918). See text accompanying notes 7, 19 *supra*.

265. See text accompanying notes 77-158 *supra*.

266. 345 U.S. at 614.

For purposes of §1, "[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*." *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948). Since the requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect.²⁶⁷

The Court's confusion is unmistakable. It applied section 2 standards, under which intent, whether specific or general,²⁶⁸ is a necessary element of proof, to section 1, when intent has, at best, only evidentiary value, and then only to the extent it assists the factfinder in evaluating the effects of a restraint.²⁶⁹

The statements in *Columbia Steel* and *Times-Picayune* have found their way into later cases, usually as dicta.²⁷⁰ In at least one case, however—albeit a case that was reversed on appeal—these two Supreme Court cases formed the premise for liability. In *Magnus Petroleum Co. v. Skelly Oil Co.*,²⁷¹ Magnus, a jobber for Skelly Oil Company, alleged that the provisions of his service station dealership agreements pertaining to the conditions of termination violated, among other things, section 1 of the Sherman Act. Specifically, Magnus alleged that he was foreclosed from purchasing a business that competed with the three Skelly service stations he ran by operation of certain provisions that made the termination of the agreements conditional upon the satisfaction of particularly onerous obligations. Magnus contended that these restrictions prevented him from becoming a jobber for Sunray DX.²⁷²

267. *Id.*

268. Proof of monopolization requires only a general intent to do the acts that necessarily and foreseeably result in monopolization. *See, e.g., United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). *See also* note 29 *supra*. On the intent needed to prove attempted monopolization, *see* note 262 *supra*.

269. *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977); *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

270. *See, e.g., Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 32 n.47 (3d Cir.), *cert. denied*, 99 S. Ct. 214 (1978) (citing *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975)); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975) (citing *Columbia Steel* and *Times-Picayune*); *Varney v. Coleman Co.*, 385 F. Supp. 1337, 1341 (D.N.H. 1974) (citing *Columbia Steel*); *Scott Publishing Co. v. Columbia Basin Publishers, Inc.*, 180 F. Supp. 754, 769 (W.D. Wash. 1959) (citing *Columbia Steel*).

Without citing *Columbia Steel* or *Times-Picayune*, the Supreme Court, in an opinion by Justice Burger, recently referred, in *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978), to "the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." Cited as support for the proposition was *United States v. Container Corp.*, 393 U.S. 333, 337 (1969), and *id.* at 341 (Marshall, J., dissenting), a price-fixing case in which anticompetitive effect was presumed because price-fixing is *per se* unlawful under § 1. The case has no language that would support Justice Burger's statement.

271. 446 F. Supp. 874 (E.D. Wis. 1978), *rev'd*, 599 F.2d 196 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3253 (Oct. 16, 1979).

272. *Id.* at 879.

A jury returned a verdict for Magnus. In its opinion denying Skelly's motion for judgment notwithstanding the verdict, the district court turned aside Skelly's contention that no violation of section 1 could be found in the absence of evidence of anticompetitive effect:

Turning first to Skelly's second argument, there are cases indicating that both the object and the effect of a restraint must be considered in determining whether a violation of §1 has occurred. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246-8 (3rd Cir. 1975); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1275 (9th Cir. 1975); *Jewel Tea Co. v. Local Unions*, 274 F.2d 217 (7th Cir. 1960). However, it has also been held that "contracts may . . . be banned by §1 if unreasonable restraint was either their object or effect." (emphasis supplied). *Times-Picayune v. United States*, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953); accord, *Cities Service Oil Co. v. Coleman Oil Co.*, 470 F.2d 925, 930-1 (1st Cir. 1972). Applying the latter standard, a violation of §1 of the Sherman Act may be found in the case at bar.

There was ample evidence from which the jury could have concluded that the object of the financing arrangements was to restrain trade.²⁷³

The court held, therefore, that section 1 was violated since Skelly had an "intent to restrain trade in the relevant market."²⁷⁴

Magnus Petroleum represents the *reductio ad absurdum* of the twin chains of authority, emanating from *Hawaiian Oke* and *Columbia Steel*, that an intent to restrain trade, standing alone, violates section 1. Viewed in this light, section 1 becomes a device by which treble damages can be recovered simply upon proof of a state of mind. This marks a drastic departure, destitute of justification, from the common law and from *Chicago Board of Trade*.

Not all courts, when given the opportunity to embrace the "effect or intent" dictum, have succumbed to these dubious authorities. Most notably, the Court of Appeals for the Fifth Circuit recently addressed and rejected the proposition that had been readily approved in *Magnus Petroleum*. In *Northwest Power Products, Inc. v. Omark Industries, Inc.*,²⁷⁵ plaintiff, Northwest Power Products, alleged that its dealership agreement had been terminated as part of a combination between a supplier and its new distributor that violated section 1.

Northwest, prior to termination, had approximately twenty percent of the Dallas-Fort Worth market for the distribution and servicing of power-actuated tools used in positioning fasteners for holding objects on masonry, including powder-actuated tools manufactured by Omark.²⁷⁶

273. *Id.* at 880.

274. *Id.* On appeal, the Seventh Circuit reversed the holding of the district court, but it did so without specific discussion of the court's conclusion that § 1 can be violated by an evil intent alone. The court of appeals stated only that it disagreed that the object of the arrangements in question was to restrain trade. 599 F.2d at 204. It also noted that the plaintiffs had failed to prove any substantial adverse impact on a relevant market. *Id.*

275. 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1021 (1979).

276. *Id.* at 85.

Omark became dissatisfied with Northwest and eventually ceased supplying it.²⁷⁷ Simultaneously, it appointed a new distributor, Bosco, which in turn hired away certain key employees of Northwest.²⁷⁸ Northwest nonetheless continued in business, selling powder-actuated tools of other manufacturers.²⁷⁹

Following termination, Northwest sued Omark and Bosco. It asserted that Bosco and Omark had conspired to eliminate it as a competitor of Bosco by informing Northwest's customers that, among other things, the company would soon be bankrupt or out of business.²⁸⁰ The district court granted summary judgment against Northwest, holding that it had not stated a claim under section 1.²⁸¹ By then Northwest's market share had dropped to two percent and Bosco's had increased to eleven and one-half percent.²⁸²

Northwest appealed the grant of summary judgment, and the Fifth Circuit affirmed on the ground, *inter alia*, that an intent to eliminate a competitor, unaccompanied by any evidence of anticompetitive effect, was not actionable under Section 1. The court reasoned as follows:

To prove an antitrust violation under the rule of reason, Northwest must show the defendants' conduct adversely affected competition. That showing is essential, because "[a]n antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.*, 433 U.S. at 53 n.21, 97 S. Ct. at 2560. See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U.Chi.L.Rev. 1 (1977). An evil intent alone is insufficient to establish a violation under the rule of reason, although proof of intent may help a court assess the market impact of the defendants' conduct. See *Chicago Board of Trade*, 246 U.S. at 238, 38 S. Ct. 242.

The district court held that Northwest had shown only the substitution of one distributor for another, and so had failed to produce facts which would demonstrate anticompetitive effect upon the business of selling and servicing PAT equipment in the North Texas region. On that reading of the evidence, its legal conclusion was impeccably correct. . . .

. . . Northwest has failed to show anticompetitive effect and so cannot establish an antitrust violation under the rule of reason.²⁸³

This holding has in turn been followed in later cases decided by the Fifth Circuit.²⁸⁴

The Supreme Court's recent holdings in *Continental T.V., Inc. v. GTE Sylvania Inc.*²⁸⁵ and *National Society of Professional Engineers v.*

277. *Id.* at 85-86.

278. *Id.*

279. *Id.*

280. *Id.* at 86.

281. *Id.* at 85.

282. *Id.* at 86.

283. *Id.* at 90-91.

284. See *Daniels v. All Steel Equip., Inc.*, 590 F.2d 111, 113 (5th Cir. 1979); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978).

285. 433 U.S. 36 (1977).

*United States*²⁸⁶ also support the conclusion that anticompetitive intent will not, standing alone, state a claim under section 1. After rejecting a rule of *per se* illegality for vertical restraints in *GTE Sylvania*, the Court held that the legality of such restraints depends upon their impact on the market: "When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason"²⁸⁷ Similarly, in rejecting application of the rule of reason to the price-fixing arrangement before it in *National Society of Professional Engineers*, the Court observed that demonstration of anticompetitive impact was crucial to proof of a section 1 violation:

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*"—in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint²⁸⁸

These recent statements by the Supreme Court re-affirm the *Chicago Board of Trade* holding that intent has only evidentiary significance and is not dispositive of the legality of a contract, conspiracy, or combination,²⁸⁹ diametrically conflict with the Court's dicta in *Columbia Steel* and *Times-Picayune*, and, in the setting of refusals to deal, add authority to the Sixth Circuit's holding in *Ace Beer* that market impact is the measure of legality for two-firm vertical conspiracies under section 1.²⁹⁰

IV. SUMMARY AND CONCLUSION

Proof of violation of section 2 of the Sherman Act requires, in the case of monopolization, a showing of willful or intentional acquisition or maintenance of monopoly power or, in the case of attempted monopolization, specific intent to monopolize. Proof of a violation of section 1, on the other hand, stands or falls on a demonstration of anticompetitive effect.²⁹¹

286. 435 U.S. 679 (1978).

287. 433 U.S. at 59.

288. 435 U.S. at 692.

289. See text accompanying note 7 *supra*.

290. The attention here given to those decisions stating or holding that joint action accompanied by anticompetitive effect or intent will support a claim under § 1 should not be understood to mean that other courts have not required proof of anticompetitive effect as a condition precedent to § 1 liability. See, e.g., *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1280 (1979); *Chow v. Union Cent. Life Ins. Co.*, 457 F. Supp. 1303, 1306-07 (E.D.N.Y. 1978); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, [1978-2] Trade Cas. (CCH) ¶ 62,151, at 75,081-82 (S.D.N.Y. 1978); *Bernard v. Curtis Circulation*, [1978-2] Trade Cas. (CCH) ¶ 62,141, at 75,035-36 (E.D.N.Y. 1978); *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039, 1047 (E.D. Mich. 1976).

291. In monopolization cases, anticompetitive effect is a *fait accompli*. Legality does not turn upon whether there is a restraint, but rather upon whether the restraint was acquired or has been maintained wilfully. See notes 29, 268 *supra*. Proof of attempted monopolization requires a prediction of whether such a wilful restraint will come to pass. See note 262 *supra*. In either situation,

Just as a good intent will not justify conduct that unreasonably restrains trade, so anticompetitive intent will not convert conduct falling short of an unreasonable restraint of trade into unlawful action.

The conclusion that anticompetitive intent cannot by itself form the basis for a finding of violation of section 1 is supported by the common law as it existed at the time of enactment of the Sherman Anti-Trust Act. Under the common law, the reasonableness of a contract or combination in restraint of trade did not pivot on the state of mind of the parties. Similarly, whether a conspiracy in restraint of trade was actionable did not depend upon the presence of anticompetitive intent on the part of the parties to the conspiracy. A conspiracy was actionable only if the object of the conspiracy or the means for attaining the object were unlawful.

The authorities holding that a violation of section 1 may be proved by evidence of anticompetitive effect or intent rest upon a misreading of *Hawaiian Oke* or upon unfounded dicta in two Supreme Court decisions, *Columbia Steel* and *Times-Picayune*.

Although the elimination of a competitor through an agreement with a common supplier (as was alleged, for example, in *Perryton Wholesale Inc. v. Pioneer Distributing Co.*,²⁹² and sought to be proven in *Oreck Corp. v. Whirlpool Corp.*²⁹³) may violate section 1 because it results in a reduction of intrabrand competition, it is the restraint that is the measure of illegality, not the presence or absence of anticompetitive intent. Indeed, "anticompetitive" intent was, at common law, a neutral factor. Lord Halsbury, in describing the significance of intent nearly ninety years ago in the *Mogul Steamship* case, made the following observation, which is still valid today:

[I]n proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful²⁹⁴

If Lord Halsbury's view were rejected, virtually all business conduct adversely affecting competitors would become illegal. Businesses act out of self-interest, and the promotion of self-interest necessarily carries with it an intent to prevail over trade rivals. This intent is inevitably anticompetitive because the actor seeks to divert the business of his competitors into his own hands. Under the cases approving intent alone as

anticompetitive impact is a foregone conclusion. The situation is significantly different in restraints challenged under § 1. In evaluating the legality of these restraints, anticompetitive impact must be independently investigated and substantiated. Once such an impact is established (by weighing all the circumstances, including, when appropriate, the actors' purpose), proof of a violation is complete and intent becomes irrelevant.

292. 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966).

293. 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 99 S. Ct. 340 (1978).

294. [1892] A.C. at 36-37.

a ground for finding violation of section 1, however, any conduct taken to further such self-interest which then causes injury to the business or property of a competitor,²⁹⁵ exposes the actor to section 1 liability, regardless of the impact of his conduct on trade in the relevant market. This construction of section 1 would make competition itself unlawful, an absurd result. Congress passed the Sherman Act to promote, not punish, competition.

295. Under § 4 of the Clayton Act (15 U.S.C. §§ 15, 26 (1976)), a person has standing to maintain a treble damage action if he has been injured in his business or property by reason of conduct unlawful under the antitrust laws.